Supreme Court, U.S.
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In the Supreme Court of the United States

SOUTHWEST MARINE, INC.,
Petitioner,

v.

RICHARD DANZIG, Secretary of the Navy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did a district court have jurisdiction to decide a government appeal from a decision of an agency board of contract appeals where the underlying government contract was maritime?

Otherwise stated:

Under the joint interplay of three federal statutes -- the Contract Disputes Act, the Federal Courts Improvement Act, and the Suits In Admiralty Act -- what court, if any, has jurisdiction of a government appeal from an agency board of contract appeals where the underlying government contract was maritime?

2. After a bankruptcy plan of reorganization is approved, can compromises with plan creditors operate as cost-reducing credits to a pre-petition government contract and thereby give rise to claims of the government for refunds of contract payments to the debtor?

PARTIES TO THE PROCEEDING

Petitioner

Southwest Marine, Inc. is a California corporation that is the successor-in-interest (by merger) to Northwest Marine, Inc., a corporation formerly known as Northwest Marine Iron Works.

The parent of Southwest Marine, Inc. is United States Marine Repair, Inc., a Delaware Corporation. Southwest Marine, Inc. has no nonwholly owned subsidiaries.

Respondent

Respondent is the United States of America acting by and through the Department of the Navy, Hon. Richard Danzig, Secretary.

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Armed Services Board of Contract Appeals: *Southwest Marine, Inc.*, ASBCA No. 47621, 96-2 BCA (CCH) ¶ 28,601 (October 11, 1996). Appendix E.

Federal Circuit Court of Appeals: *Dalton v. Southwest Marine*, 120 F.3d 1249 (Fed.Cir., Aug. 8, 1997) Appendix D.

United States District Court for the Southern District of California: *Dalton v. Southwest Marine, Inc.*, Case No. 97-1488-IEG(LSP), Third Amended Order Granting Appellant's Appeal, Reversing the ASBCA, Remanding to the ASBCA, Oct. 7, 1998 (unpublished). Appendix C.

Ninth Circuit Court of Appeals: *Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128 (9th Cir., July 10, 2000) Appendix A.

BASIS FOR JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit were entered and issued on July 10, 2000. Petitioner filed a timely petition for rehearing which was denied on September 25, 2000. Appendix B. This petition for writ of certiorari is filed within 90 days of the denial of the petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Contract Disputes Act of 1978
41 U.S.C. § 603

Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46 as applicable, to the extent that those chapters are not inconsistent with this chapter.

41 U.S.C. § 607(g)

Review

(1) The decision of an agency board of contract appeals shall be final, except that-

> (A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or
>
> (B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

Federal Courts Improvement Act
28 U.S.C. § 1295

Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-

. . . .

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1);

Suits In Admiralty Act
46 U.S.C. § 742

Libel in Personam

In cases where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . Such suits shall be brought in the district court of the United States . . . in which the vessel or cargo charged with liability is found.

46 U.S.C. § 743

Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to rules of practice obtaining in like cases between private parties . . .

46 U.S.C. § 745

Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . .

Bankruptcy Act
11 U.S.C. § 745

Effect of Confirmation [of a plan]

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors . . .

REGULATION INVOLVED
48 C.F.R. (FAR) § 31.201-5

Credits.

The applicable portion of any income, rebate, allowance or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund.

STATEMENT OF THE CASE

I. THE CONTRACT AND THE GOVERNMENT'S CLAIM

Petitioner's predecessor-in-interest, Northwest Marine, Inc., formerly known as Northwest Marine Iron Works (NMIW) performed a contract for repair and modification of the U.S. Navy vessel U.S.S. DULUTH which it completed in June 1986. The contract was maritime. *New Bedford Drydock Co. v. Purdy*, 258 U.S. 96, 42 S.Ct. 243, 66 L.Ed. 482 (1922). The contract was a "fixed-price incentive" contract under which the final price was to be determined based on the contractor's costs of performance.

After contract performance was complete, but before the final price had been determined, NMIW filed a petition in U.S. Bankruptcy Court for protection from its creditors pursuant to Chapter 11 of the Bankruptcy Code. In March 1997 the Bankruptcy Court approved NMIW's Plan of Reorganization. Under that Plan, unsecured creditors received debentures of the "reorganized company" in the amount of their claims.

In December 1989, NMIW and the Navy agreed to a revised ceiling price for the DULUTH contract. In April 1989, NMIW forwarded the Navy an invoice for the unpaid balance of the DULUTH contract ceiling price, which was then paid.

In February 1989, Southwest Marine, Inc. (SWM) agreed to purchase the stock of NMIW on condition, *inter alia*, that NMIW obtain debt concessions from its creditors. Thereafter NMIW and the Creditor's Committee created by the Plan of Reorganization agreed to compromise and settle the

balances due on NMIW's debentures based on partial payment of those amounts.

SWM purchased the stock of NMIW in April 1989.

In May 1994 the Navy's contracting officer issued a final decision finding that the "debt concessions" agreed to by the Creditors Committee "operated to disqualify such costs as allowable" and were "deemed to fall within the Credits provision of FAR [Federal Acquisition Regulation] Subsection 31.201-5." The contracting officer's decision further claimed that NMIW's DULUTH contract costs were to be adjusted by subtracting those amounts, that the Navy had therefore overpaid NMIW by $2,161,287, and demanded a refund of that amount.

II. PROCEDURAL HISTORY

SWM appealed the Navy contracting officer's decision to the Armed Services Board of Contract Appeals (ASBCA) pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 606. On cross-motions for summary judgment, by decision dated 11 October 1996, the ASBCA sustained the appeal, denying the Navy's claim. The ASBCA held that the Navy's claim, if allowed, would give the Navy a significant benefit from NMIW's bankruptcy discharge. The ASBCA concluded, as a matter of law, that the post-confirmation activities of NMIW's creditors regarding the plan debentures could not be equated to "overpayment" on the DULUTH contract. *Southwest Marine, Inc.*, ASBCA No. 47621, 96-2 BCA ¶ 28,601. Appendix E.

The government was dissatisfied with the ASBCA's decision and sought to invoke its right of appeal under CDA, 41 U.S.C. § 607(g)(1). The government filed a notice of appeal to the Federal Circuit Court of Appeals. The government then

asserted that its notice of appeal had mistakenly been filed in the wrong court and moved to transfer its appeal to the District Court for the Southern District of California (where the DULUTH was in harbor) on grounds that the contract was maritime. SWM cross-moved to dismiss on grounds that a "notice of appeal" could not have been filed in a district court and that an original action under the Suits In Admiralty Act could also not be filed in that court because the jurisdictional statute of limitations on any such action, 46 U.S.C. § 745, had run. By order dated August 8, 1997, 120 F.3d 1249, Appendix D, the Federal Circuit transferred the case to the District Court. Although the Contract Disputes Act, 41 U.S.C. § 607(g)(1), expressly provides that government appeals from decisions of agency boards of contract appeals are to be made by transmission of the decision "to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28," and although 28 U.S.C. § 1295(a)(10) expressly provides that the Federal Circuit "shall have exclusive jurisdiction ... of an appeal from a final decision of an agency board of contract appeals pursuant to . . . 41 U.S.C. § 607(g)(1)," the Federal Circuit held that it had no jurisdiction over the government's appeal. The Federal Circuit held that, because NMIW's contract was maritime the government's appeal belonged in district court. However, the Federal Circuit held that the Suits in Admiralty Act's two-year statute of limitations and the Supreme Court's decision in *McMahon v. United States*, 342 U.S. 25, 72 S.Ct. 17, 96 L.Ed. 26 (1951) (holding that the limitations are not tolled during administrative procedures) did not apply because they were inconsistent with the CDA.

Following transfer, the District Court decided the matter on briefs. The District Court's Third Amended Order reversed the ASBCA's summary judgment for SWM and granted summary judgment that the government was entitled to a refund. Appendix C. The District Court held that "the ASBCA

erred when it determined that the bankruptcy discharge precluded the Navy from seeking reimbursement for overpayment . . . where the overpayment relates to voluntary post-petition debt concessions by NMIW's creditors." SWM appealed to the Ninth Circuit.

The Ninth Circuit, in *Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128 (July 10, 2000), Appendix A, affirmed. The Ninth Circuit held that the Federal Circuit's holding that the CDA did not "change the existing appellate path of disputes involving maritime contracts" did not subject the Navy to the pre-CDA law of this Court's decision in *S&E Contractors, Inc. v. United States*, 406 U.S.1, 92 S.Ct. 1411, L.Ed 2d 658 (1972) (holding that the government had no right of appeal from agency board decisions). The Ninth Circuit held that although the CDA's provision for appeal to the Federal Circuit did not apply to maritime contract disputes, the other portion of the same sentence of the CDA, granting the government the right to appeal, did apply. The Ninth Circuit also held that the District Court, *qua* court of appeal, was "within its bounds to infer from the record that the subcontractors were not paid in full for their work on the Duluth" and to grant summary judgment for the Navy. On the merits, the Ninth Circuit held that, since the Navy's claim "arose out of the debenture holder's [sic] post-confirmation decisions to compromise their post-confirmation claims, it was error for the ASBCA to equate the debentures with the debenture holder's [sic] pre-confirmation claims" and that "the debenture holder's [sic] agreement to forego collection of their debentures" satisfied the definition of "Credits" in FAR § 31.201-5 because "there would have been no debentures had NMIW actually paid its subcontractors for Duluth Work." The effect of the Ninth Circuit's decision is that the debtor is liable to refund to the government portions of the price of a contract that was completed prior to the bankruptcy filing.

III. BASIS FOR JURISDICTION OF COURTS OF FIRST INSTANCE

(Statement in compliance with Supreme Court Rule 14.1(g)(ii))

This case was first filed in the Armed Services Board of Contract Appeals (ASBCA). That board had jurisdiction pursuant to 41 U.S.C. § 607(d).

An appeal from the ASBCA's decision was filed by the government at the Federal Circuit Court of Appeals, which appears to have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) and 41 U.S.C. § 607(g)(1), but which held that it had no jurisdiction.

The (disputed) jurisdiction of the United States District Court for the Southern District of California purported to be based on the holdings of the Federal Circuit in *Southwest Marine of San Francisco, Inc. v. United States*, 896 F.2d 532 (Fed. Cir. 1990) and in the Federal Circuit's order of transfer in this case, *Dalton v. Southwest Marine, Inc.*, 120 F.3d 1249 (Fed.Cir. 1997).

ARGUMENT FOR GRANTING THE WRIT

I. JURISDICTION: THE DECISIONS BELOW HAVE SET ASIDE THE PLAIN WORDS OF TWO STATUES AND CREATED INCONSISTENCY AND UNCERTAINTY

A. The Decisions Below Create a Conflict Between the Clear Words of Two Statutes and Decisional Law.

The writ hereby requested is necessary to resolve a conflict between decisional law and the faces and plain meanings of *two* statutes. That conflict will exist in every appeal of a dispute involving a government contract that is maritime. The conflict creates such confusion that it led, in this case, to the filing by the Department of Justice of an appeal in the "wrong" court. If the law is not clarified, the Justice Department's "error" of relying on the clear wording of two statutes will be repeated by others.

The decisions below render the law so convoluted as to hold that portions of a single sentence of a statute apply to disputes involving maritime contracts and other portions of the same sentence do not. Specifically, they have held that the sentence of CDA § 607(g)(1) that gives the government the right of appeal by transmitting "the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit" does give the government a right of appeal, but does not give a right of appeal to the Federal Circuit. The decisions below have held that although the government's appeal is governed by the Suits In Admiralty Act, it is not governed by the express procedural requirements of that statute or the jurisdictional limitations period of that statute, 46 U.S.C. §§ 743 and 745.

The conflict between the words of the statutes and decisional law is easily resolved under the principles of statutory construction. Under the decisions of this Court, it was clear error for the courts below to mine legislative history for intent when there is no ambiguity or uncertainty on the faces of the statutes.

If the courts below correctly determined that the statutes directing appeals to the Federal Circuit do not mean what they say for maritime contracts, and pre-CDA law applies to those

contracts, then the questions that result from that general proposition are equally important. If the Suits In Admiralty Act directs maritime contract appeals to district courts, then its jurisdictional two-year statute of limitations and the holding of *McMahon v. United States*, *supra*, (that the Suits In Admiralty Act's statute of limitations is not tolled by administrative procedures) should also apply. If the appeals involving maritime contracts are subject to pre-CDA law, then they are subject to *S&E Contractors, Inc. v. United States*, *supra*, and the government had no right to "appeal" by libel against its administrative board in district court. If the district courts have appellate jurisdiction to review board of contract appeals decisions, then the procedures for such proceedings should be known.

The writ hereby requested is necessary to provide clarity and consistency to a scheme of laws that is thoroughly confused by the decisions below.

B. The Lower Courts' Failure to Adhere to the Clear Words of Two Statutes Has Produced Conflict, Confusion, Uncertainty and Erroneous Filings.

The Federal Courts Improvement Act of 1982 seems clear on its face:

"28 U.S.C. § 1295

(a) The United States Court of Appeals for the Federal Circuit shall have *exclusive jurisdiction-*

. . . .

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act

of 1978 (41 U.S.C. § 607(g)(1))." Emphasis added.

The Contract Disputes Act (CDA), as amended to conform to the Federal Courts Improvement Act, seems equally clear:

41 U.S.C. § 607:

"(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that-

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit . . . , or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the Board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28 . . . "

Despite the clarity of those statutes, in this case and a predecessor, the Federal Circuit has held that it has no jurisdiction at all over appeals from the ASBCA where the underlying contract is maritime. In *Southwest Marine of San Francisco, Inc. v. United States*, 896 F.2d 532 (Fed.Cir. 1990), the Federal Circuit focused on the CDA section that deals with maritime contracts:

41 U.S.C. § 603:

"Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title,

> arising out of maritime contracts, shall be governed by chapter 20 [the Suits in Admiralty Act] or 22 [the Public Vessels Act] of title 46 as applicable, to the extent that those chapters are not inconsistent with this chapter."

The Federal Circuit noted that "jurisdiction over matters arising in admiralty, including maritime contracts has traditionally been with the federal district courts." (Indeed "original jurisdiction" over such matters is expressly vested in them by 28 U.S.C. § 1333.) Then, relying on legislative history in the form of a statement by Senator Byrd, the Federal Circuit found that Congress had made a "jurisdictional decision" which was "imperfectly embodied in section 603." That "jurisdictional decision," according to the Federal Circuit, was that:

> " . . . Congress, in enacting the Contract Disputes Act of 1978 assured that no change was made in the existing appellate path of disputes involving maritime contracts." 896 F.2d 535.

Further relying on a Senate Report, the Federal Circuit concluded that, in enacting the Federal Courts Improvement Act, including 28 U.S.C. § 1295(a)(10), "Congress, in forming the Federal Circuit, did not change the appellate path of maritime contract disputes." 896 F.2d 535.

In concluding that CDA § 603 embodied a "jurisdictional decision," the Federal Circuit did not squarely address the facts that the "maritime" statutes referenced in that section, the Suits in Admiralty Act and the Public Vessels Act, do not purport to grant jurisdiction, but that the statue which does give district courts admiralty jurisdiction, 28 U.S.C. § 1333, is not mentioned in the CDA. Neither did the Federal

Circuit address the problem that the jurisdiction given to district courts by that statue is "original jurisdiction," not appellate jurisdiction.

The Federal Circuit's decision has led to confusion and uncertainty in the laws that apply to maritime government contract disputes:

- Both the contractor in *Southwest Marine of San Francisco, Inc.*, *supra*, and the Justice Department in this case relied on the words of the statutes and filed appeals in the "wrong" court -- the Federal Circuit.

- The district courts' admiralty jurisdiction statute, 28 U.S.C. § 1333, provides "original jurisdiction" and has no provision for "appeals"; the district courts have no rules or established procedures for appeals from BCAs; what procedures might apply, and what time limits might exist are unknowns.

- The Suits In Admiralty Act and Public Vessels Act specify that suits (libels in personam) under their terms are to be brought in district courts. 46 U.S.C. § 742 and 782. Despite the terms of CDA § 603 that the admiralty statutes apply "to the extent that those chapters are not inconsistent with this chapter," the Federal Circuit has given those provisions precedence over the inconsistent term of CDA § 607(g)(1). But when it came to resolving whether the admiralty statute's two-year statute of limitations, 46 U.S.C. § 745 (which is jurisdictional; *Nan Sing Marine Co. v. United States*, 811 F.2d 1495 (Fed. Cir. 1987)) and the Supreme Court's decision in *McMahon v. United States*, *supra*, applied to actions in district court for review of BCA decisions, the Federal Circuit held that they did

not apply because the limitations would "almost always" run out "while the case was wending its way through the required administrative process" and the limitations statute was therefore inconsistent with the CDA. 120 F.3d at 1252.

- Prior to the CDA, the "existing appellate path" of all government contract disputes was a dead end for the Government; it had no right of appeal from the decision of its own agency board. *S&E Contractors v. United States*, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed. 658 (1972). When SWM relied on that law in this case, the Ninth Circuit determined that the CDA had, after all, given the government a right of appeal for maritime contracts. 217 F.3d at 1136-1137.

C. The Decisions Below Were Erroneous.

It was clear error for the courts below to devise law that contradicted the clear wording of two statutes and then to fail to apply that law in a consistent manner. It is not the role of the courts to probe the "mind" of the legislature and change the law to what they discern to have been intended. Resort to legislative history or any source extrinsic to a statute is warranted only when the statute is not clear on its face.

> "As has been declared in a number of cases: 'Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.'" 2A Singer, *Statutes and Statutory Construction*, (6th Ed., 2000) § 45:02.

Or, as this Court has said it:

> "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete' [citation omitted]."" *Burlington Northern RR Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1869, 95 L.Ed.2d 404 (1987).
>
> "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409, 113 S.Ct. 2151, 2157, 124 L.Ed.2d 368 (1993).

There is no ambiguity, there is no uncertainty whatever in *two* pertinent statutes. 41 U.S.C. § 607(g)(1) and 28 U.S.C. § 1295(a)(10) both provide that appeals from BCA decisions are the province of the Federal Circuit. Nor does CDA § 603 create any ambiguity. It does not by any terms purport to grant, invoke, or preserve district court jurisdiction; it does not use the word "jurisdiction." § 603 simply provides for application of law provided by the Suits In Admiralty Act and the Public Vessels Act "to the extent that" those laws "are not inconsistent with" the CDA. Under that law, the Federal Circuit, in deciding appeals of BCA decisions on maritime contracts should apply the portions of the admiralty statutes that are not inconsistent with the CDA. (Such as, for example, the two-year statute of limitations, which was not inconsistent with the CDA until the CDA was amended in 1994 - long after the DULUTH contract was performed - to add a 6-year statute of limitations. P.L. 103-355, §2351). Without an ambiguity, it was not the role of the courts below to go beyond the "four corners" of clear legislation and make new and confusing law.

The fact that the results of the decisions below has been confusion that led to the "incorrect" filings by the Justice Department in this case is a reason to reject those decisions. When one of several possible statutory interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result. 2A Singer, *Statutes and Statutory Construction* (6th Ed., 2000) § 45:12. It is surely an unreasonable result when a statute is interpreted to direct litigants to the wrong court.

The interpretation that 28 U.S.C. § 1295(a)(10) and 41 U.S.C. § 607(g)(1) do not mean what they say is also faulty because it patronizes Congress by stating that it "imperfectly embodied" its true intent and because it assumes that Congress did not know the law. The law that gives the district courts original admiralty jurisdiction is not found in Title 46, which is referred to in CDA § 603. Chapters 20 and 22 of title 46 contain a waiver of sovereign immunity and procedures for original lawsuits. District court admiralty jurisdiction is granted by 28 U.S.C. § 1333. If Congress had intended CDA § 603 to say something about jurisdiction, it could have made reference to the actual jurisdictional statute. Legislative language is to be interpreted, not on the basis that the legislature was inept, but on the assumption that the legislature was aware of existing statutes. 2A Singer, *supra*, § 45:12. Therefore, it is to be assumed that if Congress had wanted to carve out a jurisdictional exception to the CDA, Congress would have cited the district court's jurisdictional statute. That Congress did not cite 28 U.S.C. § 1333 shows a lack of intent to confuse jurisdiction over appeals from BCAs with original jurisdiction over maritime actions.

It was plain error for the courts below to decline to enforce 28 U.S.C. § 1295(a)(10) and 41 U.S.C. § 607(g)(1) as

they are written. Certiorari should be granted to review that flagrantly confusing statement of law.

It was equally erroneous for the courts below to fail to apply the law they discerned in "legislative intent" in a consistent, coherent manner.

If the district courts, and not the Federal Circuit, do have jurisdiction to hear appeals of BCA decisions on maritime contracts because Congress willed that pre-CDA law should apply to those contracts, then it was error for the courts below not to apply that law with consistency. It was certainly error, if pre-CDA law, including the Suits In Admiralty Act, applies, to hold that that statute's jurisdictional statute of limitations, 46 U.S.C. § 745, does not apply simply because it is too short. If the CDA "made no change in the existing appellate path of disputes involving maritime contracts," it was certainly error to hold that the portion of that "path" that was the Supreme Court's decision in *S&E Contractors, Inc. v. United States*, *supra*, was changed. If the CDA excepted appeals of maritime contracts from its terms and left them subject to pre-CDA law, then the government had no right to libel its own agency board.

II. BANKRUPTCY: THE DECISIONS BELOW DEPRIVE A GOVERNMENT CONTRACTOR OF THE PROTECTIONS OF BANKRUPTCY LAW

The holdings of the District Court and the Ninth Circuit operate to deprive government cost-reimbursement contractors of the "fresh start" promised by bankruptcy law. The decisions mean that compromises with holders of debentures of the reorganized company can be "related" back to a contract performed prior to the bankruptcy petition. Under the law established in this case, the amounts of those compromises are to be subtracted from the price of a government contract that

was completely performed prior to the filing of the bankruptcy petition. Under those rulings, the party who benefits from the compromises with the debenture holders is the government.

Certiorari should be granted to review the holdings of the District Court and the Ninth Circuit because those holdings impair the ability of any holder of a government cost-reimbursement contract to restructure his debts and obtain a fresh start under bankruptcy law. For every debt settled in the bankruptcy proceeding, the debtor will incur a new debt to the government. The holdings below are therefore in derogation of the intent and purpose of bankruptcy law.

The holdings below were clear error, in the first place, because, as the ASBCA correctly perceived, the debentures created by the bankruptcy plan of reorganization were not contract costs. The debts, if any, that were "related to" contract costs within the meaning of the FAR credits provision, 48 C.F.R. § 31.201-5, were accounts payable debts to suppliers and subcontractors to the DULUTH contract and were incurred prior to the bankruptcy petition. As the ASBCA correctly held, those debts continued to exist, but were barred from collection. 11 U.S.C. § 524, 1141, *In re Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993). Therefore, neither those debts nor any costs to which they might correspond or be "related" have ever been changed or "credited." The ASBCA also correctly held that the debentures created by NMIW's plan of reorganization were "new claims" that could not be equated to pre-petition costs or payments by the Navy. 11 U.S.C. § 1141(a), and *e.g.*, *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993). In this case, the Ninth Circuit has held that the debenture holders' compromises "related to" contract costs, but somehow were not to be "equate[d] to pre-confirmation claims," that is, to the debts, if any, that were actually represented by contract costs. That holding is unprecedented and unjustifiable.

Most importantly, the decisions below deprive any government cost-reimbursement contractor of the "fresh start" that is the purpose and promise of bankruptcy law. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). The decisions below contradict the provision of 11 U.S.C. § 1141 that "property dealt with by the plan is free and clear of all claims of creditors" by giving the government a claim for refund of money that it paid to the debtor. The decisions below transfer to the Navy (or to any buyer under a cost-reimbursement contract) the benefit of compromises of debts created by a plan of reorganization. The decisions below mean that a cost-reimbursement contractor cannot get clear of his debts in a Chapter 11 reorganization: for every debt he settles he incurs a new one to his pre-petition contract customer. That result negates the very purpose of the Bankruptcy Act.

CONCLUSION

Certiorari should be granted to resolve the current contradiction of two clear statutes by decisional law applied to this case and to clarify what pre-CDA law continues to apply to maritime government contracts. Those issues are important because they will apply to every maritime government contract dispute.

The issue created by the interplay of bankruptcy and government contract law is equally important. The decisions below mean that a debtor in possession under a confirmed plan of reorganization, if he had a cost-reimbursement contract prior to his petition, is not free to settle with his creditors without creating new debts to the government. That is, such a contractor cannot obtain a "fresh start."

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 10, 2000]

No. 98-56724

D.C. No. CV-97-01488-IEG

SOUTHWEST MARINE INCORPORATED,
Appellant,

v.

RICHARD DANZIG[1],
Secretary of the Navy,
Appellees.

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

[1] Richard Danzig, is substituted for his predecessor, John H. Dalton, as Secretary of the Navy, Fed. R. App. P. 43(c)(2).

Court of Appeals Opinion - 7/10/00

Argued and Submitted
April 11, 2000–Pasadena, California

Before: Ferdinand Fernandez, and Kim McLane Wardlaw
Circuit Judges, and Charles R. Weiner,[2]

Opinion by Judge Weiner

SUMMARY

Admiralty and Marine/Contracts

The court of appeals affirmed a judgment of the district court. The court held that postconfirmation debenture concessions for subcontractors of a bankrupt contractor fell within the meaning of the Credits Provision Clause entitling the Navy to refund of overpayment on a contract.

The Navy contracted with Northwest Marine Iron Works (NMIW) to overhaul the U.S.S. Duluth, using a cost-plus arrangement, under which the Navy reimburses the contractor for its actual allowable costs, adjusted according to a contractually-defined formula, which is limited by a ceiling price. Four months after redelivery, NMIW filed a Chapter 11 bankruptcy petition in the District of Oregon. NMIW submitted

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[2] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

forms to the Navy identifying final contract costs, the Navy's contracting officer (CO) increased the ceiling price, and NMIW claimed payment of $ 2,811,077, the new ceiling price less all prior progress payments and the agreed upon sum to be retained for closeout. Meanwhile, NMIW signed an agreement with appellant Southwest Marine Incorporated, which agreed to acquire NMIW's outstanding stock, conditioned upon NMIW receiving specific debt concessions from its secured creditors and the debenture holders. The CO determined that those debt concessions fell within the meaning of the Credits Provision Clause and sought a refund of approximately $ 2,000,000 overpayment to NMIW.

Southwest appealed the CO's decision to the Armed Services Board of Contract Appeals (ASBCA) pursuant to the Contract Disputes Act (CDA), which entered summary judgment for Southwest, applying bankruptcy law principles to find that a discharge in bankruptcy operates as an injunction against postconfirmation action to collect preconfirmation debts. The Navy appealed with the Federal Circuit, which found it had no jurisdiction and transferred the case to the district court. The district court denied Southwest's motion to dismiss for want of prosecution, based on the fact the Navy took no action to prosecute the appeal for six months. The district court reversed the ASBCA, entered partial summary judgment in favor of the Navy, and remanded to the ASBCA for computation.

Appellee Richard Danzig, the Secretary of the Navy, argued on appeal that the order of the district court remanding the action to the ASBCA was not a final, appealable order. On appeal, Southwest contested the jurisdiction of the district

court, arguing the Secretary has no right of appeal from the initial adverse finding of the ABSCA.

[1] Since the district court was sitting as a court of admiralty, its order, even if interlocutory was appealable.

[2] In its decision, the Federal Circuit determined that there was no dispute that the contract involved in this case was wholly maritime. From this premise, the Federal Circuit determined that the case must be transferred because it had no appellate jurisdiction under the CDA over a case involving a maritime contract. The conclusion that the Duluth repair contract was a maritime contract was a law of the case and 28 U.S.C. 1292(a)(3) applied to supply jurisdiction over what was unquestionably an otherwise unappealable interlocutory order.

[3] Section 1292(a)(3) is an exception to the final judgment rule and, therefore, is construed narrowly. It permits appeals only when the order appealed from determines the rights and liabilities of the parties. The purpose of the provision is to allow the party found liable in admiralty proceedings to take an immediate appeal without submitting to a protracted trial of the damage issues. Even an entry of partial summary judgment can be the subject of an interlocutory maritime appeal so long as the order appealed determined the rights and liabilities of the parties.

[4] The district court order unquestionably determined the right and liabilities of Southwest. It found as a matter of government contract law that the Navy could not be barred from recovering its overpayments and that it was entitled to reimbursement. It remanded to the Board only for a calculation of quantum. As the Board was given no further opportunity to

adjudicate the Navy's entitlement, Southwest's liability to make reimbursement was settled. Under § 1292(a)(3), the district court's order was appealable.

[5] The CDA provides (1) for appellate jurisdiction in the district courts of maritime contract suits; (2) for appellate jurisdiction in the Federal Circuit for all other appeals from ASBCA rulings; and (3) an otherwise uniform rule that either contractors or agency heads may seek judicial review of adverse decisions. The district court's exercise of appellate jurisdiction over this maritime contract suit was proper.

[6] The district court must weigh five factors to determine whether to dismiss a case for lack of prosecution: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions. More specifically, on the issue of prejudice, the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure. The law presumes injury from unreasonable delay. However, this presumption of prejudice is a rebuttable one and if there is a showing that no actual prejudice occurred, that factor should be considered when determining whether the trial court exercised sound discretion. Southwest's failure to show the delay was unreasonable made the presumption of prejudice rebuttable and, in turn, made Southwest's failure to show actual prejudice a proper basis for the district court's denial of Southwest's motion to dismiss the Navy's appeal to the district court of want of prosecution.

[7] The district court, while sitting as a court of appeal from the ASBCA, has jurisdiction to grant summary judgment to the Navy. **[8]** Disputed issues of fact were not presented precluding entry of summary judgment on the liability (entitlement) issue.

[9] Whether NMIW accepted progress payments without paying the subcontractors was not in dispute. The record included the undisputed fact that the plan of reorganization awarded unpaid subcontractors debentures in place of their prepetition claims. **[10]** The Navy's contention that NMIW sought reimbursement on the entirety of the costs, even though it knew they would be compromised by the subcontractors' acceptance of the reorganization plan, was also not genuinely disputed.

[11] In bankruptcy law, confirmation not only discharges the debtor form its pre-confirmation debts, it also revests all of the property of the estate back in the debtor, and all the property dealt with in the plan is revested free of all claims and interests of the creditors. While the reorganization plan binds preconfirmation creditors, it does not bind postconfirmation creditors. As the Navy's claim against NMIW/Southwest for recoupment of the overpayment arose out of the debenture holder's postconfirmation decisions to compromise their postconfirmation claims, it was error for the ASBCA to equate the debentures with the debenture holder's preconfirmation claims.

[12] The correct focus should have been upon how the debenture holder's voluntary relinquishment of their rights affected NMIW's claim for costs on the Duluth project, a question wholly distinct from the operation of the bankruptcy

discharge. Under the Credits Provision Clause, Southwest was required to credit back to the Navy any income, rebate, allowance or other credit related to an allowable cost, which was received by or accrued to the contractor. The debenture holder's agreement to forego collection of the debentures satisfied this definition. It was related to the claimed cost and it accrued to the contractor since Southwest no longer had to pay them their full principle. Accordingly, the CO's final decision that the debenture concession fell within the meaning of the Credits Provision Clause was correct, the ASBCA's application of bankruptcy law was error, and the district court conclusion that the Navy was entitled to reimbursement was correct.

COUNSEL

Peter B. Jones, Jones & Donovan; Ross Pyle, Kathleen Wood Wagner, Pyle, Sims, Duncan & Stevenson, for appellant Southwest Marine Incorporated.

Genevieve Holm, Commercial Litigation Branch, Civil Division, United States Department of Justice, for appellees Richard Danzig, Secretary of the Navy.

OPINION

WEINER, Senior District Judge:

I.

The Secretary of the Navy brought this action seeking a refund of approximately $ 2 million allegedly overpaid to

Southwest Marine Incorporated's predecessor in interest, Northwest Marine Iron Works (NMIW), for overhaul work completed on the U.S.S. Duluth in 1986. The action was heard initially by the Armed Services Board of Contract Appeals (ASBCA), which entered judgment for Southwest. The Navy filed an appeal with the United States Court of Appeals for the Federal Circuit, which held it had no jurisdiction to hear the case and transferred it to the United States District Court for the Southern District of California. *Dalton v. Southwest Marine, Inc.*, 120 F.3d 1249 (Fed. Cir. 1997) ("*Dalton I*"). The district court reversed the ASBCA, entered judgment in favor of the Navy and remanded to the ASBCA for computation of damages. Jurisdiction in the district court was premised upon the exception to 41 U.S.C. § 607(g)(1)(b) for marine contracts as discussed by the Federal Circuit in *Dalton I*. Jurisdiction on appeal is premised upon 28 U.S.C. § 1291, but contested by the Secretary, who argues that the order of the district court, remanding the action to the ASBCA, was not a final order. Likewise, Southwest contested the jurisdiction of the district court, arguing that the Secretary had no right of appeal from the initial adverse finding of the ASBCA. We find that although the district court's remand order was interlocutory, it is immediately appealable under 28 U.S.C. § 1292(a)(3). We also find the district court's exercise of jurisdiction was proper and that the district court correctly held on the merits that the Navy was entitled to reimbursement. Accordingly, we affirm in all respects.

II.

The underlying facts are not in dispute. The Navy let out the contract to NMIW to overhaul the U.S.S. Duluth in August 1985; the work was completed and the ship redelivered

to the Navy in 1986. The contract was a "fixed-price, incentive contract," which is something of a misnomer since it does not contain a fixed price. Rather it is a cost-plus arrangement, under which the Navy reimburses the contractor for its actual allowable costs, adjusted according to a contractually-defined formula, which is limited by a ceiling price. Thus, the actual price of the work is not determined at the time the contract is let. Once final cost is determined, the final price is then determined with a profit to the contractor calculated as the work is performed pursuant to a formula. Prior to determination of the final price, progress payments are made to the contractor, subject to standard clauses allowing for adjustment for over and under payments and a Credits Provision Clause[3] which reduces the amounts chargeable to the Navy in the event of a reduction in contractor costs.[4] After redelivery of the ship, NMIW continued to perform various contract responsibilities, such as negotiating the cost of change orders and submitting data necessary to establish the final contract price.

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[3] The Credits Provision Clause provides:

> The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund.

[4] The initial contract provided for a target cost of $ 12,282,010 and a ceiling price of $ 15,966,613. However, over the course of the work, the parties executed over 200 change orders, many of which altered the target cost and ceiling price.

On October 29, 1986, four months after redelivery, NMIW filed a Chapter 11 petition in District of Oregon. The Navy's contracting officer (CO) for the Duluth and Supervisor of Shipbuilding were both aware of the petition, and the Navy filed claims regarding other work NMIW had performed on other ships . No claim was ever asserted over the work on the Duluth. NMIW's Second Amended Plan of Reorganization was approved by the bankruptcy court on March 20, 1987. It provided that unsecured claims in excess of $ 1,000 would be converted into interest bearing debentures of the reorganized company in a principal amount equal to the allowed unsecured claim, and for the repayment of that principal out of the reorganized company's net income.

In April 1987, one month after confirmation of the plan, NMIW submitted forms to the Navy identifying final contract costs of $ 25,093,862 on the Duluth. On December 21, 1988, the Navy agreed to settle NMIW's claims. On April 3, 1989, the CO executed a modification increasing the ceiling price to $ 23,295,752. Thereafter, NMIW submitted an invoice to the Navy claiming payment of $ 2,811,077, i.e. the new ceiling price less all prior progress payments and the agreed upon sum to be retained for closeout. The CO approved the invoice the next day.

Meanwhile, in the interim period between when NMIW submitted its final cost calculation and the date the CO approved the new the ceiling price, NMIW signed a letter of agreement with Southwest which agreed to acquire NMIW's outstanding stock. The February 23, 1989 acquisition agreement was conditioned upon NMIW receiving specific debt concessions from its secured creditors and the debenture holders. The stock purchase was completed on April 17, 1989;

a few days later the bankruptcy court issued a Chapter 11 Final Report memorializing the concessions of the creditors. The Navy asserts that, at the time it established the final audit of costs and rates under which NMIW would be compensated for those costs, it had no knowledge of the pending stock purchase agreement and creditor concessions.

By letter of April 21, 1989, the Navy notified NMIW that it had learned that at least one of the company's creditors had agreed to forgive some indebtedness, and was considering a recoupment action for fees it had paid the contractor, and for which NMIW was no longer obligated to pay out as costs to others. NMIW maintained that the Navy had no right to participate in a compromise of debts occurring in conjunction with bankruptcy proceedings. On May 11, 1994, after several years of unsuccessful negotiations, the CO issued a final decision holding that the Navy had overpaid NMIW $ 2,161,287. The CO determined that debt concessions fell within the meaning of the Credits Provision Clause.

Southwest appealed the CO's decision to the ASBCA pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 607(d).[5] The Board decided the case on cross motions for

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[5] The section provides:

> Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency . . . . In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in

summary judgment. The Navy contended that it was entitled to judgment because (1) the Credits Provision Clause, the Incentive Price Revision (IPR) clause of the contract, and the common law, all authorize recovery of overpayments; and (2) Southwest was estopped from contesting recovery because, had the Navy been told of the creditor concessions prior to establishing the final costs, it would have calculated the net amount owed to NMIW differently.

The Board disagreed, holding that forgiveness of the debentures received under the reorganization plan could not be considered an overpayment by the Navy under the fixed-price incentive contract.[6] Applying bankruptcy law principles, the ASBCA decision reasoned that a discharge in bankruptcy does not extinguish or cancel pre-confirmation debts. Rather it merely releases the debtor from personal liability for such debts, because the discharge operates as an injunction against post-confirmation action to collect pre-confirmation debts. The bankruptcy court's confirmation of the plan therefore enjoined NMIW's creditors from collecting debts related to the work on the Duluth, but did not extinguish those debts. The Board concluded that were the Navy to recoup as an overpayment monies never paid by NMIW for subcontractor costs because the subcontractors cannot now collect those costs from NMIW, the Navy would obtain a significant benefit from NMIW's bankruptcy discharge: i.e. the receipt of subcontractor materials

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the United States Court of Federal Claims.

[6] The Board noted that, as the parties had never agreed upon a total final cost and final contract price, the case had to be analyzed on whether the Navy was entitled to the return of the progress payments.

and labor for no cost. Accordingly, the Board held that the Navy cannot equate the subcontractor's post-confirmation decision to compromise the debentures they obtained under the reorganization plan with an "overpayment" to NMIW on the Duluth contract.

Instead, the Board granted the cross motion of Southwest which argued that once a contractor performs the contract and incurs costs, payment is due without regard to whether the contractor has actually paid his suppliers or may have payment disputes with them. Finding that the contract included a provision requiring the Navy to make progress payments, computed as a percentage of total costs incurred whether or not actually paid, the Board concluded that the Navy was not authorized to recoup progress payments based upon a failure to pay debts owed to subcontractors or others. The Board also rejected the Navy's argument that, under the Credits Provision Clause, Southwest was required to credit the government if it simultaneously or subsequently recovered a portion of the same costs billed to the Navy from another source. Again the Board, relying on bankruptcy law principles, found that NMIW's discharge did not amount to a recovery of the same costs from another source because the pre-confirmation debt continued to exist, albeit uncollectible from the debtor.

Following the Navy's appeal to the Federal Circuit, and that court's transfer of the appeal to the district court in August 1997, the Navy took no action to prosecute the appeal for six months, leading to the filing by Southwest of a motion to dismiss for want of prosecution. The motion was denied by the district court by order of April 6, 1998. It found that the delay was not unreasonable because the Navy made a good faith

effort to inquire into whether the case was actually transferred and received incorrect information from the district court clerk's office. It was not notified of the transfer until October 27, 1997. The court also refused to find that the passage of time between the Navy's initial claim for reimbursement in 1989 and the CO's decision in 1994 should preclude the Navy from appealing the Board decision.

Thereafter the district court issued an order and two amended orders "granting appellant's appeal." Only the second amended order, which the district court specifically said was not a final order, is before us on appeal.[7] In that order, the version before us on appeal, the district court determined that it had jurisdiction over the appeal, rejecting Southwest's argument that the CDA does not authorize agency appeals from an adverse Board decision in maritime cases. On the merits, the district court held that the Board erroneously focused upon NMIW's pre-petition debts, rather than on how the voluntary post-petition activities of NMIW's creditors, i.e. their

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[7] The first order, dated August 20, 1998, granted the Navy's appeal and reversed the ASBCA. The court found that Southwest owed the Navy the $ 2,161,287 overpayment, but remanded for further proceedings so that the ASBCA could make any necessary modifications to the $ 2,161,287 figure, such as for interest. An amended order issued one week later, but made no material changes to the district court's conclusions. A second amended order issued on October 1, 1998 in response to a motion by Southwest seeking reconsideration. The district court granted the motion for reconsideration in part, striking the amount of $ 2,161,287, and remanding to the ASBCA for calculation of quantum. In the argot of the ASBCA, cases are bifurcated into entitlement and quantum phases, rather than liability and damages.

compromising of the debentures, affected NMIW's 1989 representations concerning its entitlement to cost reimbursement under the contract. In other words, the issue which should have been addressed by the Board was not the bankruptcy law question of whether the pre-petition debts were collectible, but rather the government contract law question of how the post-petition agreement for creditor concessions affected the Navy's ability to recoup its progress payments.

Having found that the Board misapplied bankruptcy law to preclude recoupment, the district court went on to conclude that the Board also erred in determining that the Navy could not recover its overpayments under the contract based on the voluntary post-petition debt concessions. It found, without engaging in any further analysis, that the Navy was entitled to reimbursement under the Credit Provision Clause and the IPR Clause.

In granting in part and denying in part Southwest's motion for reconsideration which led the issuance of the second amended order, the district court specifically declined to amend the prior order to designate it as a final order. It stated:

> . . . the Court declines [t]he request to designate the order as final]. First the Court notes that SWM fails to establish that the Court's refusal to add this language amounts to clear error or that it required for any other ground presented in a proper Rule 59(e) motion. Second, the Court finds that the order speaks for itself; the order remands this case to the ASBCA for further proceedings. The Court is not persuaded

> that SWM's interest in attempting to appeal this issue justifies impeding the natural course of this litigation, i.e. a remand for a determination of quantum.

This appeal followed.

III.

The standard of review of an appeal from the ASBCA is provided by statute. Under 41 U.S.C. § 609(b), in an appeal by either the contractor or the government, "notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."

IV.

[1] We address first the issue of our own jurisdiction. The Navy argues the district court's order was not final nor certified as a controlling question of law immediately appealable under 28 U.S.C. § 1292(b). It asserts that, in general, orders which grant partial summary judgment as to liability but leave open the question of damages are by their nature interlocutory under Fed. R. Civ. P. 56(c); it adds that in the specific context of a government contracts case, an ASBCA decision in a bifurcated action, addressing only entitlement and not quantum, is not a final order subject to appeal. In response,

Southwest argues that, since the district court was sitting as a court of admiralty, its order, even if interlocutory, is appealable under 28 U.S.C. § 1292(a)(3). That section permits appeals of "interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." We agree that jurisdiction is provided by § 1292(a)(3).

[2] In its decision, the Federal Circuit determined that there was no dispute that the contract involved in this case was wholly maritime. *Dalton I*, 120 F.3d at 1250; *see also Southwest Marine of San Francisco, Inc. v. United States*, 896 F.2d 532, 533 (Fed. Cir. 1990) ("*San Francisco*", *citing New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 99, 42 S. Ct. 243, 66 L. Ed. 482 (1922) (a contract for ship repairs is a maritime contract; one for original construction is not). From this premise, the Federal Circuit determined that the case must be transferred because it had no appellate jurisdiction under the CDA over a case involving a maritime contract. *Dalton I*, 120 F.3d at 1251-52. The conclusion that the Duluth repair contract is a maritime contract is the law of the case[8] and 28 U.S.C. §

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[8] "Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal. 'The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'" *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir 1997) (en banc) *quoting Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 281 (9th Cir. 1996). While the prior appeal in this case was to the Federal Circuit, the doctrine should apply nonetheless. We have held that the doctrine is discretionary and not mandatory, merely expressing the practice of courts generally to refuse to reopen what has been decided and that a "prior decision should be followed unless: '(1) the

1292(a)(3) applies to supply jurisdiction over what is unquestionably an otherwise unappealable interlocutory order.

[3] We have previously held that § 1292(a)(3) is an exception to the final judgment rule and, therefore, is construed narrowly. *Seattle-First National Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985). It permits appeals only when the order appealed from determines the rights and liabilities of the parties. *Id.*; *Arkin v. White Cloud Charter Boat Co., Inc. (In re White Cloud Charter Boat Co., Inc.)*, 813 F.2d 1513, 1515 (9th Cir. 1987). The purpose of the provision is to allow a party found liable in admiralty proceedings to take an immediate appeal without submitting to a protracted trial of the damage issues. *In re Complaint of Nautilus Motor Tanker Co., Ltd.*, 85 F.3d 105, 110 n. 3 (3rd Cir. 1996); *Slatton v. Martin K. Eby Construction Co, Inc.*, 491 F.2d 707, 708 (8th Cir. 1974). We have held that even an entry of partial summary judgment can be the subject of an interlocutory maritime appeal so long as the requirement that the order appealed determined the rights and liabilities of the parties is satisfied. *Kesselring v. F/T Arctic Hero*, 30 F.3d 1123, 1125 (9th Cir. 1994) (where district court's determination that certain crewmen held preferred wage liens on equipment eliminated any possibility of recovery by equipment owner,

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decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'" *Jeffries*, 114 F.3d at 1489, *quoting Rainbow* 77 F.3d at 281. As none of these three factors is present, we see no reason to reopen the conclusion reached by the Federal Circuit that this was a maritime contract.

owner's rights were actually determined and interlocutory appeal was permissible.)

[4] Here, the district court order unquestionably determined the rights and liabilities of Southwest. It found as a matter of government contract law that the Navy could not be barred from recovering its overpayments and that it was entitled to reimbursement. It remanded to the Board only for a calculation of quantum. As the Board was given no further opportunity to adjudicate the Navy's entitlement, Southwest's liability to make reimbursement was settled. Under § 1292(a)(3), the district court's order is thus appealable.

V.

Southwest next argues that the district court improperly exercised jurisdiction in deciding the Navy's appeal because under the CDA the Navy has no right of appeal from ASBCA decisions on maritime contracts. Seizing upon language in the Federal Circuit's decision in *San Francisco*, that "Congress in enacting the Contract Disputes Act of 1978 assured that no change was made in the existing appellate path of disputes involving maritime contracts", 896 F.2d at 534, Southwest argues that, since pre-CDA the Navy had no right of appeal to the courts from an adverse Board decision absent fraud, the district court had no jurisdiction to hear the appeal. *See S & E Contractors, Inc. v. United States*, 406 U.S. 1, 19, 92 S. Ct. 1411, 1421, 31 L. Ed. 2d 658 (1972); Coburn, *The Contract Disputes Act of 1978*, (New York 1982) ¶. 2-5. Southwest's argument misreads the holding of *San Francisco* and ignores specific provisions in the CDA permitting the government to file appeals of adverse determinations. The court's use of the phrase "appellate path" was a reference to jurisdiction, not the

substantive question of whether a party enjoys the right of appeal.

San Francisco was concerned only with the jurisdictional question of where appeals from agency contract boards of appeal involving maritime contracts must be brought. It did not address the question of whether the CDA permits appeals by the government. In that case, the Federal Circuit determined that jurisdiction over matters arising in admiralty, including maritime contracts, was unaffected by the passage of the CDA because, (1) prior to its passage, such jurisdiction was traditionally vested in the district courts, *Id.*, 896 F.2d at 534 ("Jurisdiction over matters arising in admiralty, including maritime contracts, has traditionally been with the federal district courts."); and (2) during its consideration of the CDA, Congress made clear that such jurisdiction was intended to be maintained. *Id.* quoting 124 Cong.Rec. 36267 (1978) ("The legislative report defined very precisely that the current jurisdiction for Maritime Contract claims is to be maintained and not changed by [the CDA]."). The court concluded "thus Congress in enacting the Contract Disputes Act of 1978 assured that no change was made in the existing appellate path of disputes involving maritime contracts. *San Francisco*, 896 F.2d at 534. The court likewise found that in forming the Federal Circuit, Congress again did not change the appellate path of maritime contract disputes since "[n]othing in the history of the Federal Courts Improvement Act suggests any congressional intent to reconsider its jurisdictional decision as to maritime contracts." *Id.* at 535.

The Federal Circuit's conclusion, that passage of the CDA did not change the way in which maritime contract cases are to be brought, does not establish that the substantive

provisions of CDA, granting the Navy the right to appeal adverse decisions, do not apply to maritime contract cases. As the Federal Circuit has already held in this case, "[n]othing in section 603 of the Contract Disputes Act excludes maritime contracts from the purview of the Contract Disputes Act." *Dalton I*, 120 F.3d at 1251. The only caveat to this proposition is that, in enacting 41 U.S.C. § 603, Congress specifically provided that appeals from agency boards of contract appeals under § 607 and judicial review under § 609 arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46 as applicable, *to the extent that those chapters are not inconsistent with this chapter.*[9] Because Chapters 20 and 22

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[9] Chapter 20 of Title 46 concerns suits in admiralty by or against vessels or cargoes of the United States; Chapter 22 concerns suits in admiralty against the United States for damages caused by public vessels. The Federal Circuit has held that while § 603 does not mention suits against the United States in contract, the legislative history left no doubt that Congress intended that section 603 cover such suits:

> This jurisdictional decision [that maritime contract cases remain in the district courts], albeit made by Congress, was imperfectly embodied in section 603, for section 603 refers to Chapter 20 . . . [and] Chapter 22 . . . and is silent as to the issue before Congress, *viz.*, suits against the United States in contract. However, the legislative history leaves no doubt that Congress intended, through section 603, to cover such suits.

San Francisco, 896 F.2d at 534.

apply to maritime contracts only if consistent with the CDA, the provisions of the CDA necessarily supercede those chapters if they are inconsistent. Thus, it is irrelevant that pre-CDA law did not provide for appeals by the government.

In addition, there are at least two other sections of the CDA which support the conclusion that agencies as well as contractors may appeal decisions from contract boards of appeal. Section 607(g)(1)(B) specifically provides that the agency head may, with the approval of the Attorney General, seek judicial review in the Federal Circuit; § 609 provides that in the event of such appeal under § 607 "by a contractor *or the Government*" questions of law shall be reviewed de novo, while questions of fact shall be final and conclusive.

[5] Thus, the statutory scheme of §§ 603, 607 and 609 provides (1) for appellate jurisdiction in the district courts for maritime contract suits; (2) for appellate jurisdiction in the Federal Circuit for all other appeals from ASBCA rulings; and (3) an otherwise uniform rule that either contractors or agency heads may seek judicial review of adverse decisions. Accordingly, the district court's exercise of appellate jurisdiction over this maritime contract suit was proper.

VI.

Southwest next argues that the district court abused its discretion[10] when it declined to dismiss the appeal for want of

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[10] A district court's decision on a motion to dismiss an action for lack of prosecution is reviewed for an abuse of discretion.

jurisdiction because the court ignored Local Rule 41.1 which provides:

> Actions or proceedings which have been pending in this court for more than six months, without any proceeding or discovery having been taken therein during such period, may, after notice, be dismissed by the court for want of prosecution, at the calling of a calendar prepared for that purpose by the clerk. Such a dismissal shall be without prejudice, unless otherwise ordered.

In ruling on the motion, the district court held

> The Court agrees with the Navy that SWM has not demonstrated unreasonable delay on the Navy's part. Although CivLR 41.1 creates a presumption of unreasonable delay after six months of inaction, the Court notes that the decision to dismiss under CivLR 41.1 is discretionary and the Court declines to exercise its discretion . . . . First, the Court notes that the Navy apparently made a good faith effort to inquire into the status of the case after the Federal Circuit transferred the action. Due to a miscommunication with the Clerk's Office, however, the Navy was not informed of the transfer until October 27, 1997 . . . . The Court finds that, under the circumstances, the Navy

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Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998).

> has not unreasonably delayed in pursuing this action. Additionally, the Court finds that SWM has failed to demonstrate actual prejudice.

Southwest asserts that it did not have to demonstrate that the Navy's dely was unreasonable or that it suffered actual prejudice and the district court's requiring it to do so was an abuse of discretion. This argument lacks merit.

[6] In *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 (9th Cir. 1994), we held that we require the district court to weigh five factors to determine whether to dismiss a case for lack of prosecution: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." More specifically, on the issue of prejudice, we stated that

> the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure . . . . The law presumes injury from unreasonable delay. However, this presumption of prejudice is a rebuttable one and if there is a showing that no actual prejudice occurred, that factor should be considered when determining whether the trial court exercised sound discretion.

Id. at 1452-53 *citing Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). Thus, Southwest's assertion that it did not have to demonstrate unreasonable delay or that it suffered

actual prejudice is inaccurate. Unreasonable delay is the foundation upon which a court may presume prejudice. Its failure to show the delay was unreasonable made the presumption of prejudice rebuttable and, in turn, made Southwest's failure to show actual prejudice a proper basis for the district court's denial of the motion.

VII.

[7] Southwest next argues, that even if the district court had jurisdiction to reverse the summary judgment in its favor, its decision, while sitting as a court of appeal, to grant summary judgment to the Navy, was improper since it made no finding that there were no genuine issues of disputed fact. This argument also bears little weight. What Southwest describes as disputed factual contentions are actually disputed legal contentions which the district court rightfully decided.

[8] Southwest identifies two allegedly disputed facts upon which the district court relied: (1) the Navy's factual contention that NMIW accepted progress payments without actually paying the subcontractors for their costs; and (2) the Navy's factual contentions that post-petition obligations replaced the original pre-petition ones and that NMIW sought reimbursement on these costs to the subcontractors when it certified, post-petition the April 5, 1989 invoice. As proof that the district court relied on these disputed issues of fact, Southwest directs our attention to the court's statement that "the Navy correctly focuses on the voluntary post-petition activities of NMIW's creditors and how these activities affect NMIW's 1989 representations." None of these excerpts indicate that disputed issues of fact were present precluding entry of

summary judgment for the Navy on the liability (entitlement) issue.

[9] Whether NMIW accepted progress payments without paying the subcontractors was not in dispute. The record before the district court included the entire history of the Navy's payments to NMIW as found by the ASBCA.[11] The district court was also within its bounds to infer from the record that the subcontractors were not paid in full for their work on the Duluth. The record included the undisputed fact that the plan of reorganization awarded unpaid subcontractors debentures in place of their pre-petition claims. If they had been paid in full, there would have been no debentures issued for unpaid bills on the Duluth project. Thus there appears to be no genuine issue that NMIW received progress payments but did not fully pay the subcontractors and Southwest identifies nothing in the record to indicate otherwise.

[10] The Navy's alleged factual contentions that post-petition obligations replaced the original pre-petition ones were not factual contentions at all. Rather they were a subpart of its legal argument that, whether or not the pre-petition debts were extinguished by the reorganization, the Navy's efforts to recover costs related only to the creditor's voluntary surrender of their debentures, and thus bankruptcy law was not implicated in the issue of whether the Navy was entitled under the contract to share in those cost reductions. Finally, the

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[11] Under the CDA, the district court was required to accept the facts as found by the ASBCA as final and conclusive unless fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such findings are not supported by substantial evidence. 41 U.S.C. § 609(b)

Navy's contention that NMIW sought reimbursement on the entirety of the costs, even though it knew they would be compromised by the subcontractors' acceptance of the reorganization plan, was also not genuinely disputed. The ASBCA found that NMIW forwarded the invoices to the Navy on April 5, 1989 without making any mention of the stock purchase agreement between NMIW and Southwest, which was conditioned upon the debentures being compromised.

VIII.

Arriving at long last at the main substantive issue in this appeal, we believe it can be stated succinctly: Does bankruptcy law trump government contract law and prevent the Navy from recouping its overpayment to NMIW? The district court correctly held that the answer to this question is no.

The ASBCA concluded, applying bankruptcy law principles, that the Navy may not take advantage of the subcontractors' forgiveness of the debentures received under the reorganization plan. It reasoned that the subcontractor's compromise of the debentures could not constitute a forgiveness, rebate or credit of the Duluth contract costs under the Credits Provision Clause because the inability of the creditors to collect their pre-confirmation Duluth claims was due to the bankruptcy discharge and not any voluntary action on their parts. As the debentures replaced those pre-confirmation claims, the Board concluded their post-confirmation compromise as part of the acquisition agreement likewise could not inure to the Navy's benefit. The basis for this reasoning is not supported by the record. The record clearly showed that the claimed reduction in Duluth contract costs was based not on NMIW's bankruptcy discharge or the

debenture holders' inability to collect their pre-confirmation claims, but rather on the debenture holders' subsequent decisions, some two years after the plan confirmation, to compromise their post-confirmation claims — the debentures — as part of the NMIW/Southwest merger. Thus, the proper analysis must focus upon what effect, if any, bankruptcy law provisions have upon post-confirmation acts which compromise post-confirmation claims.

[11] Confirmation not only discharges the debtor from its pre-confirmation debts, it also revests all of the property of the estate back in the debtor, and all the property dealt with in the plan is revested free of all claims and interests of the creditors, 11 U.S.C. § 1141(b)-(d). Importantly, while the plan binds pre-confirmation creditors, it does not bind post-confirmation creditors. *See* 8 Collier on Bankruptcy, Par. 1141.02[1] (15th Rev. ed. 2000); *Holywell Corp v. Smith,* 503 U.S. 47, 53-54, 112 S. Ct. 1021, 1025, 117 L. Ed. 2d 196 (1992) (trustee appointed under plan-established trust liable for post-confirmation taxes because binding nature of the confirmed plan reaches only pre-confirmation obligations); *see also Shure v. State of Vermont (In re Sure-Snap Corp.),* 983 F.2d 1015 (11th Cir. 1993) (confirmation discharged pre-confirmation liabilities only; debtor not protected from post-confirmation creditor for debt arising from voluntary post-confirmation activity related to asset that was formerly part of estate). As we stated in a different context, once the bankruptcy court confirms a plan of reorganization, the debtor is free to go about its business without further supervision or approval of the court, and concomitantly, without further protection of the court. *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Ass'n,* 997 F.2d 581, 589 (9th Cir. 1993), *citing Pettibone Corp. v. Easley,* 935 F.2d 120, 122 (7th Cir. 1991). The court in

Pettibone noted that, "[f]ormerly a ward of the court, the debtor is emancipated by the plan of reorganization. A firm that has emerged from bankruptcy is just like any other defendant in a tort case: it must protect its interests in the way provided by the applicable non-bankruptcy law . . . . " *Id. See also Norwest Equipment Finances, Inc. v. Nath (In re D & P Partnership),* 91 F.3d 1072, 1074 (8th Cir. 1996) (generally, once the plan has been confirmed, the estate of the debtor and the bankruptcy court's jurisdiction ceases to exists). As the Navy's claim against NMIW/Southwest for recoupment of the overpayment arose out of the debenture holder's post-confirmation decisions to compromise their post-confirmation claims, it was error for the ASBCA to equate the debentures with the debenture holder's pre-confirmation claims.

[12] As the district court concluded, the correct focus should have been upon how the debenture holders' voluntary relinquishment of their rights affected NMIW's claim for costs on the Duluth project, a question wholly distinct from the operation of the bankruptcy discharge. Once the bankruptcy law aspect of the case is disposed of, the Navy's right to recoupment under straightforward government contracting law becomes clear. Under the Credits Provision Clause, Southwest was required to credit back to the Navy any income, rebate, allowance or other credit related to an allowable cost, which was received by or accrued to the contractor. The debenture holder's agreement to forego collection of the debentures satisfied this definition. It was related to the claimed cost — there would have been no debentures had NMIW actually paid its subcontractors for the Duluth work — and it accrued to the contractor since Southwest no longer had to pay them their full principle. Accordingly, the contracting officer's final decision that the debenture concessions fell within the meaning of the

Credits Provision Clause was correct, the ASBCA's application of bankruptcy law was error, and the district court conclusion that the Navy was entitled to reimbursement was correct.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed September 25, 2000]

No. 98-56724

D.C. No. CV-97-01488-IEG

SOUTHWEST MARINE INCORPORATED,
Plaintiff-Appellant,

v.

JOHN DALTON,
Secretary of the Navy;
RICHARD DANZIG,
Secretary of the Navy,
Defendants-Appellees.

Before: FERNANDEZ and WARDLAW, Circuit Judges, and WEINER[1], District Judge.

[1] The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The Panel has unanimously voted to deny the appellant's petition for rehearing.

The petition for rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed October 7, 1998]

CASE NO. 97-1488-IEG (LSP)

JOHN DALTON
SECRETARY OF THE
NAVY,
Appellant,

v.

SOUTHWEST MARINE,
INC.,
Appellee.

THIRD AMENDED ORDER GRANTING APPELLANT'S APPEAL; REVERSING THE ASBCA; REMANDING TO THE ASBCA [Doc. #13]

The instant appeal arises out of a contract dispute between appellant John H. Dalton, Secretary of the Navy

("Navy"), and appellee Southwest Marine, Inc. ("SWM").[1] On October 11, 1996, the Armed Services Board of Contract Appeals ("ASBCA") addressed the contact dispute in an opinion on the parties' cross-motions for summary judgment. The ASBCA granted SWM's motion and denied the Navy's motion. As a result, the Navy seeks review of the ASBCA order in this Court. The Navy contends that ASBCA committed two legal errors: (1) ASBCA erroneously determined that a bankruptcy discharge barred the Navy's recovery for overpayment on the contact and (b) ASBCA erred in analyzing the applicable contract clauses under Federal Acquisition Regulations ("FAR") which would entitle the Navy to relief.

BACKGROUND

A. Factual Background

In August of 1985, the Navy awarded a repair and overhaul contract for the USS Duluth to Northwest Marine Ironworks ("NMIW"). The contract is a "fixed-price incentive

[1] On August 20, 1998, the Court issued an order granting the Navy's appeal, reversing the ASBCA, and remanding the case to the ASBCA. In that order, the Court inadvertently left out the word "not" on the first full sentence on the top of page 10. Therefore, the Court issues the instant amended, order to correct that mistake. The corrected sentence is found on page 10, ln. 3 of this amended order.

contract." Under this type of contract, the Navy reimburses the contractor for its actual "allowable" costs,[2] which are adjusted according to a contractually-defined formula (which is limited by a ceiling price). Therefore, at the time of award, the contract does not have a firm price. It is subject to redetermination after performance when the parties negotiate a total final cost. Once that final cost is determined, then the final price is calculated to include a profit for the contractor pursuant to the contract formula. Prior to the determination of a final price, the contract provides for interim progress payments to the contractor. *See* FAR, 52.232-16 (Alt. I) (Progress Payments Provision).[3] It also contains (a) two standard clauses to allow for adjustment in the event of over or underpayment based on the final establishment of allowable costs and price[4] and (b) a Credits Provision Clause

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[2] Under the contract, "'costs' . . . means allowable costs in accordance with Part 31 of the FAR in effect on the date of this contract." FAR 52.216-16(b).

[3] Under the Progress Payment Clause applicable to small businesses, such as NMIW, the contractor (in this case NMIVO need not have actually paid the subcontractors to obtain an interim payment. *See* FAR 52.232-16 (Alt. I) (a)(1)(I) ("[u]nless the contractor requests a smaller amount, each progress payment shall be computed as 85% of the Contractor's total costs incurred under this contract whether or not actually paid") (emphasis added). However, the contractor's subsequent failure to pay these costs in the ordinary course of business may result in suspension of the payments. *See* FAR 52.232-16 (Alt. I) (c)(4) ("[t]he Contracting Officer may reduce or suspend progress payments . . . , after finding on substantial evidence . . . [t]he Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business").

[4] These clauses are FAR 52-232-16 (j)(1)(ii) (section of the Progress Payments clause) and FAR 52.216-16(g)(2). Section

which reduces the amounts chargeable to the Navy in the event of a reduction in costs.[5] See FAR 31.201-5 (Credits Provision).

NMIW performed the basic contract work from August 1985 to June 1986. According to the Navy, NMIW accepted progress payments during this time without actually paying the subcontractors for their costs. In October of 1986, NMIW filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Oregon. On March 20, 1987, the Bankruptcy Court confirmed a reorganization plan which provided that unsecured creditors with claims in excess of $1000 (including NMIW's unpaid subcontractors) would receive new debt obligations from the reorganized company in an amount equal to their original claim. In April of 1987, NWIM submitted a standard form 1411 ("Statement of Allowable Costs Incurred") to the Navy to identify its final allowable costs on the Duluth contract; in the statement, NMIW indicated that it incurred $25,093,862 in costs. On December 21, 1988, the parties resolved NMIW's request for

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52.216-16(g)(2), which is part of the Incentive Price Revision ("IPR") clause, provides that, in the event a contractor is overpaid, "the Contractor shall immediately refund or credit to the Government the amount of this excess."

[5] The Credits Provision clause provides: "[t]he applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund." FAR 31.201-5.

an equitable adjustment with the Navy agreeing to a $2.8 million increase in the contract price.

On February 23, 1989, pursuant to a letter agreement, SWM agreed to purchase NMIW through a stock acquisition. SWM's offer was conditioned upon NMIW's ability to obtain debt concessions from several of its creditors. At the time, the Navy was unaware of these terms. On March 20, 1998, following an audit by the Defense Contract Audit Agency ("DCAA"), the parties agreed to indirect final rates on the Duluth contract. On April 3, 1989, the Navy issued a contract modification authorizing an additional $2.8 million payment to NMIW. On April 5, 1989, NWIM forwarded an invoice for $2,811,077 to the Navy. In the invoice, NWIM certified, pursuant to FAR 33.207(c), that "the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable." On April 6, 1989, the Navy approved payment and, shortly thereafter, NWIM received payment. On April 17, 1989, SWM purchased NMIW's stock and commenced operating the shipyard. On April 20, 1989, the Bankruptcy Court issued a final report which noted NWIM's success in obtaining post-petition creditor concessions. On April 21, 1989, the Navy informed NMIW that it had learned of NMIW's procurement of debt concessions and, based on these concessions, it was considering recoupment of fees paid. On April 26, 1989, NMIW responded to the Navy's letter by indicating that it was unaware of any contract provision which would allow recovery of fees paid.

Over the next five years,[6] as the parties disputed these issues, the Navy had the DCAA perform additional audits which revealed that (a) NMIW incurred costs of $24,467,062 in conjunction with the Duluth project; (b) NMIW obtained approximately $3 million in debt concessions; (c) as a result, NMIW only incurred approximately $21 million in "allowable costs" under the contract; and, (d) therefore, NMIW owed the Navy over $2 million in overpayments. On May 11, 1994, pursuant to § 605(a) of the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 et seq., the Contracting Officer ("CO") issued a final decision finding that the Navy had overpaid $2,161,287 and demanding that NMIW refund that sum to the Navy. The CO determined that the creditors' post-petition concessions made that sum unallowable pursuant to three contract provisions: (a) the Progress Payments Clause (FAR 52.232-16), the IPR Clause (FAR 52.216-16), and the Credits Provision (FAR 31.201-5). SWM appealed that decision to the ASBCA.[7]

B. The ASBCA Decision

On October 11, 1996, ASBCA issued an order on the parties' cross-motions for summary judgment. In addressing the Navy's motion for summary judgment, the ASBCA rejected the Navy's contention that it was entitled to recover contract costs

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[6] The Court notes that, to date, the parties have yet to agree upon a final cost and price which would allow them to terminate the contract.

[7] In December of 1990, SWM executed a novation with the United States whereby it assumed all of NMIW's contractual rights and obligations.

based on the post-petition concessions of NMIW's creditors.[8] First, the ASBCA noted that "[t]he Navy's assertion here that creditors forgave, rebated, or otherwise credited to NMIW unpaid USS Duluth contract costs is not accurate as a matter of law." ABSCA Opinion at 8 [hereinafter "Opinion"].[9] The ASBCA decision linked this assertion to the creditors' pre-petition debts and noted that the bankruptcy discharge precluded the creditors from collecting on those debts and, therefore, "[i]f this Board were to agree with the Navy's assertion that it may recoup as an 'overpayment' monies paid NMIW for subcontractor costs because the subcontractors cannot now collect those costs from NMIW, the Navy would obtain a significant benefit from NMIW's bankruptcy discharge, 'i.e. the receipt of subcontractor supplies and services at no cost or charge.'" *Id.* Second, the opinion further reasoned that, as a matter of law, the Navy ca-mot equate the creditors' post-confirmation activities with overpayment on the Duluth contract. *Id.* Based on the Navy's inability to establish overpayment, the ASBCA denied its motion for summary judgment.

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[8] Although there is no dispute that NMIW negotiated for a reduction of its post-petition debt with a number of its creditors, the Court is mindful of the parties' dispute concerning how to characterize the post-petition conduct of NMIW's creditors. The Navy refers to the creditors' actions as debt "forgiveness." SWM objects to this characterization as unfounded. Therefore, the Court will refer to the actions as concessions.

[9] Although the parties cite to the ASBCA opinion published in the bound Board of Contract Appeals Decisions, the Court cites to the ASBCA opmion as contained in the original Board record of this case which the Court received on May 15, 1998.

In addressing SWM's motion, the ASBCA noted that none of the contract's clauses provided for recovery based on debts that were discharged in bankruptcy. Specifically, the ASBCA noted "the 'discharge' of subcontractor or other debts under a bankruptcy reorganization plan cannot be considered debt 'forgiveness' because pre-confirmation debts continue to exist legally after 'discharge' and simply are enjoined from collection as a personal liability of the contractor." *Id.* at 10. The ASBCA rejected the Navy's contention that summary judgment was inappropriate based on the need to resolve factual issues concerning whether the disputed costs were incurred and allowable. The Board noted that "[i]t is undisputed that DCAA performed various audits relating to this contract and found NMIW had incurred costs of $24,467,062 prior to the actions which the DCAA and the CO characterize incorrectly as USS Duluth debt 'forgiveness.'"

C. The Instant Appeal

On June 19, 1998, the Navy filed the instant petition for review of the ASBCA decision pursuant to the CDA, 41 U.S.C. §§ 601 et seq. In its petition, the Navy challenges the ASBCA decision on two grounds. First, the Navy contends that ASBCA erroneously determined that a bankruptcy discharge barred the Navy's recovery for overpayment on the contract. Second, the Navy argues that ASBCA erred in analyzing the applicable contract clauses under Federal Acquisition Regulations ("FAR") which would entitle the Navy to relief. The Navy also advances an alternative argument that, even if NMIW's debts were forgiven in bankruptcy, it is still entitled to recover.

JURISDICTION

The Navy invokes this Court's jurisdiction pursuant to 41 U.S.C. § 607(g)(1)(B) which authorizes agencies such as the Navy to seek review of an unfavorable decision of an agency board of contract appeal.[10] In conducting this appeal, the Court is guided by § 603 which provides that maritime appeals arising under § 607(g) "shall be governed by chapter 20 or 22 of Title 46 as applicable, to the extent those chapters are not inconsistent with this chapter." 41 U.S.C. § 603.

SWM argues that the Court is without jurisdiction to hear the instant appeal because the CDA does not authorize agency appeals from an adverse board decision in maritime matters. To support this assertion, SWM cites to *Southwest Mar/ne v. United States*, 896 F.2d 532 (Fed. Cir. 1990). In *Southwest Marine*, the Federal Circuit addressed the appropriate forum for hearing a maritime contractor's appeal from an adverse decision by the ASBCA. In holding that the district courts and not the Federal Circuit were the appropriate forum for heating these appeals, the *Southwest Marine* Court noted that district court traditionally maintained jurisdiction over maritime matters and that, in enacting the CDA in 1978, Congress "assured that no change was made in the existing appellate path of disputes involving maritime contracts." *Southwest Marine*, 896 F.2d at 534. Based on this discussion,

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[10] Section 607(g)(1)(B) provides, "[t]he decision of an agency board of contract appeals shall be final, except that the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review . . . ."

SWM contends that, in order to determine whether the Navy may appeal an adverse ASBCA decision, the Court must examine what path of review was available to contracting agencies prior to the CDA's enactment. SWM notes that, prior to the establishment of the CDA, the law provided that contractors could appeal adverse board decisions, but agencies could not. *See S&E Contractors, Inc. v. United States*, 406 U.S. 1 (1972). Although SWM recognizes that § 607(g) of the CDA modified that rule with respect to agencies generally, SWM maintains that this change did not extend to maritime matters.

The Court is unpersuaded by SWM's argument. Although the Federal Circuit's decision in *Southwest Marine* indicated that the appellate path was preserved in the district courts for maritime matters, the decision provides no support for the more ambitious argument that, in spite of the CDA's express authorization, no appellate review would be available for agencies seeking review of adverse board decisions in maritime matters. Moreover, SWM fails to present any support for treating maritime matters differently with respect to an agency's right of appeal. Although § 603 provides that maritime contracts should be governed chapters 20 or 22 of Title 46, § 603 expressly states that the rules set forth in those chapters should be followed "to the extent those chapters are not inconsistent with this chapter." 41 U.S.C. § 603. In addition, the ability for an agency to appeal is recognized in other CDA provisions. *See* 41 U.S.C. § 609(b) and (c) (referring to "appeal by a contractor or the government"). Furthermore, the Court notes that the Federal Circuit (a) previously rejected SWM's efforts to dismiss the instant appeal and (b) determined that this Court was the appropriate forum to hear the instant appeal. SWM has failed to present a compelling argument against jurisdiction. Accordingly, the

Court finds that, pursuant to the CDA, it has jurisdiction to hear this appeal.

STANDARD OF REVIEW

Section § 609(b) of the CDA provides:

> In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b).

DISCUSSION

A. Did ASBCA Err as Matter of Law in Determining that NMIW's Bankruptcy Proceedings Precluded the Navy's Recovery for Overpayment?

The first issue raised by the instant appeal is whether the ASBCA erred in determining that the Navy's right to recovery was barred by operation of bankruptcy law. In its opinion, the ASBCA rejects the Navy's attempt to recover its alleged overpayment to NMIW. The ASBCA notes that the Navy's characterization that creditors forgave NMIW unpaid

contract costs is "not accurate as a matter of law" because the inability of creditors to collect on NMIW's pre-petition debts is due to NMIW's discharge in bankruptcy and not to any voluntary actions on the part of the creditors. Opinion, p. 8. The ASBCA explains that allowing the Navy to recoup its outlays merely because NMIW's creditors are precluded from collecting on NMIW's debts would provide the Navy with a significant benefit, namely "the receipt of subcontractor supplies and services at 'no cost or charge.'" *Id.* Citing to *Green v. Welsh*, 985 F.2d 114, 118 (3d Cir. 1992), and *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985), the ASBCA underscores the point that a debtor's discharge in bankruptcy does not serve to discharge third parties from pre-confirmation liabilities. In rejecting the Navy's ability to equate the creditors' post-petition actions with any overpayment, the ASBCA notes that the confirmation plan provides NMIW with a fresh start. In a conclusory manner and without any ease law to support this position, the ASBCA goes on to state that this fresh start precludes the Navy from asserting an overpayment claim. *Id.*

The Navy advances two principal arguments in support of the instant appeal with respect to this ASBCA analysis. First, the Navy contends that the operation of bankruptcy principles is inapposite in relation to its claims of overpayment and, therefore, the ASBCA's analysis is irrelevant. The Navy argues that, regardless of whether the NMIW's pre-petition debts were wiped out by the 1987 bankruptcy reorganization, the Navy's efforts to recover costs relates to the creditors' voluntary post-petition actions in April of 1989. The Navy contends that (a) the post-petition obligations replaced the original pre-petition ones; (b) these "new" obligations represented, at least in part, debts which NMIW owed its

subcontractors for Duluth work; (c) NMIW sought reimbursement on these costs to the subcontractors when it certified, post-petition, the April 5, 1989 invoice; and, (d) therefore, when the creditors (including the subcontractors) voluntarily agreed to compromise their claims, the Navy was entitled, pursuant to the contract, to share in the reduction of costs.

In distinguishing the ASBCA's bankruptcy analysis, the Navy also rejects the ASBCA's assertion that the Navy is seeking to improperly benefit from NMIW's discharge. The Navy notes that (a) the cases cited by the ASBCA, such as *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985), address the efforts of co-debtors or guarantors to benefit from a party's discharge in bankruptcy; (b) the Navy is not in such a position, but rather seeks to obtain a refund of costs which NMIW is no longer obligated to pay; and, (c) therefore, the ASBCA reasoning does not apply. Essentially, the Navy argues that unless it is allowed to seek recovery of funds, NMIW will recover a windfall because it will have obtained post-petition payments (April 7, 1989) from the Navy for subcontractor work on the Duluth project which the subcontractors subsequently excused.

Second, having distinguished the ASBCA's reliance on bankruptcy principles, the Navy argues that the ABSCA's analysis of the Navy's overpayment challenge to the post-petition actions is inadequate, in addressing the Navy's argument that it overpaid NMIW based on the 1989 creditor concessions, the Board noted that the post-petition obligations provided NMIW with a fresh start and, "accordingly, as a matter of law, the Navy cannot equate the post-confirmation

activities of NMIW's subcontractors regarding financial instruments obtained under the reorganization plan with Navy "overpayment" on the USS Duluth contract." Opinion, p. 8. The Navy contends that (a) by focusing on the link to the bankruptcy proceedings this analysis suffers the same defect as the preceding discussion of the Navy's claim based on pre-petition debt and (b) this reasoning is not supported by any case law.

In opposition to the Navy's arguments, SWM reiterates the reasoning of the ASBCA. SWM underscores the importance of the bankruptcy proceedings in providing NMIW with a "fresh start." SWM endeavors to distinguish the Navy's efforts to establish that post-petition debt concessions destroy NMIW's ability to properly include the debts as allowable, incurred costs under the contract. SWM argues that this logic is flawed because the original pre-petition debts continue to exist and creditors are simply enjoined from collecting on those debts. *See* 11 U.S.C. § 524(a)(3) (stating that a discharge in bankruptcy operates as an injunction against collection); *American Hardwoods, Inc. v. Deutsche Credit Corp.*, 885 F.2d 621 (9th Cir. 1988) (same). Therefore, SWM argues that NMIW's costs never changed because these debts remained on NMIW's books and, therefore, are properly treated as incurred, allowable costs under the contract. SWM asserts that to hold otherwise would provide the Navy with the kind of windfall benefit which the ASBCA indicated was impermissible under the applicable bankruptcy provisions.

Having reviewed the arguments, the Court agrees with the Navy. First, the Court notes that both the ASBCA and SWM erroneously focus on NMIW's pre-petition debts. Although these debts were discharged in bankruptcy, the Court

notes that the Navy correctly focuses on the voluntary post-petition activities of NMIW's creditors and how those activities affected NMIW's 1989 representations concerning their entitlement to cost reimbursement under the contract. Therefore, the Navy's recovery efforts are not directed to the involuntary bar on debt collection raised by operation of bankruptcy law. Rather, the ability to recoup payments is appropriately addressed as matter of government contracting law concerning the effect of the post-petition actions of NMIW's creditors. Accordingly, as a matter of law, the ASBCA erred when it determined that the bankruptcy discharge precluded the Navy from seeking reimbursement for overpayment.

B. Did the ASBCA Err In Construing the Contract's Provisions?

Having determined that bankruptcy law does not preclude the Navy from seeking reimbursement for overpayment on the contract, the Court now examines the ASBCA's analysis of the contract provisions. The Navy contends that the ASBCA erred in construing the two contract provisions which authorize recovery in this case.[11] In its decision, the ASBCA indicated that the bankruptcy discharge prevented the Navy's recovery under the contract. However, as previously discussed, the discharge does not preclude recovery

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[11] Although the ASBCA opinion discussed the three contract provisions relied upon by the CO in his decision, at oral argument, the Navy argued that reimbursement for any overpayment was controlled by two contract provisions, the Credits Provision and the IPR Clause. Accordingly, the Court limits its analysis to those two provisions.

for overpayment where the overpayment relates to voluntary post-petition debt concessions by NMIW's creditors. As a matter of law, the ASBCA erred in concluding that the Navy could not recover under the contract for these concessions. The Navy is entitled to reimbursement under the Credit Provision Clause, FAR 31.201-5,[12] and the IPR Clause, FAR 52.216-16.[13]

CONCLUSION

Based on the preceding discussion, the Court finds that the ASBCA committed two legal errors in addressing the parties' cross-motions for summary judgment. First, the ASBCA erred as a matter of law in finding that NMIW's bankruptcy discharge prevented the Navy from seeking recovery for overpayment on the Duluth contract. Second, the ASBCA erred as a matter of law in finding that the Navy could not recover for overpayment under the terms of the contract. Accordingly, the judgment of the ASBCA is **REVERSED**. As the instant appeal resolves the issue of the Navy's entitlement to overpaid contract costs, the Court hereby **REMANDS** the matter to the ASBCA for a determination on the merits of quantum.

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[12] FAR 31.201.5 provides: "[t]he applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund."

[13] The IPR Clause provides for reimbursements pursuant to subsections 52.216-16 (d) and (g).

IT IS SO ORDERED.

DATED: October 7, 1998 /s/_____
IRMA E. GONZALEZ, Judge
United States District Court

cc: All Parties

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Filed August 8, 1997]

No. 97-1240

John H. Dalton, SECRETARY OF THE NAVY, *Appellant*,	)
v.	)
SOUTHWEST MARINE, INC., *Appellee*.	)

ON MOTION

Before MAYER, CLEVENGER, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

ORDER

The Secretary of the Navy moves to transfer this case, involving an appeal of the decision of the Armed Services Board of Contract Appeals (ASBCA), ASBCA No. 47,621, 96-

2 BCA ¶ 28,601, to the United States District Court for the Southern District of California. Southwest Marine, Inc. opposes and moves to dismiss the secretary's appeal. The secretary opposes the motion to dismiss.

BACKGROUND

Northwest Marine Iron Works entered into a contract with the United States Navy to repair the USS Duluth. After work under the contract was completed, Northwest Marine filed for bankruptcy. In April 1989, the Navy paid Northwest Marine for work under the contract, and Southwest Marine acquired Northwest Marine. A dispute arose thereafter concerning whether Northwest Marine should have reimbursed the Navy for certain debt concessions it received from its creditors in connection with the sale to Southwest Marine.

On May 11, 1994, the contracting officer determined that in view of certain debt concessions, the Navy had overpaid Northwest Marine by approximately $ 2.2 million. Southwest Marine timely appealed to the ASBCA in accordance with the Contract Disputes Act. *See* 41 U.S.C. § 606 (1994). On October 11, 1996, the ASBCA granted summary judgment in favor of Southwest Marine. This appeal followed.

DISCUSSION

The secretary argues that this case should be transferred to a district court, pursuant to 28 U.S.C. § 1631 (1994), because this court does not have jurisdiction over a case involving a maritime contract. Southwest Marine agrees that the secretary may only seek review in a district court but does not agree that we should transfer. Southwest Marine's first

argument is that an appeal cannot be transferred to a district court from a court of appeals, because there is no procedure for filing an appeal in a district court. Second, Southwest Marine argues that the appeal should not be transferred because the secretary's case would have been untimely if filed in a district court.

I.

We note that there is no dispute that this contract is wholly maritime. Thus, this court clearly lacks jurisdiction over the secretary's appeal of the ASBCA's decision. *See Umpqua Marine Ways, Inc. v. United States,* 925 F.2d 409 (Fed. Cir. 1991); *Southwest Marine of San Francisco, Inc. v. United States,* 896 F.2d 532 (Fed. Cir. 1990). The issue is whether this case may be transferred, pursuant to section 1631, to the court in which the case should have been filed.

Southwest Marine's first argument, that section 1631 does not permit transfer of an appeal to a district court, is without merit. Section 1631 provides relief when an action or an appeal is filed in the wrong court. The statute provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of an administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or

> appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed or noticed for the court from which it is transferred.

The language of § 1631 draws no distinction between civil actions and appeals or between district courts and courts of appeals. The statute allows for the transfer of a "civil action... or an appeal" filed in a "court," as defined by 28 U.S.C. § 610 (1994), to any other such court. 28 U.S.C. § 1631. Section 610 defines court as including both courts of appeals and district courts. *See* 28 U.S.C. § 610. Moreover, section 1631 is a remedial statute designed to eliminate any prejudice that results from filing in an improper forum. *See Rodriguez-Roman v. Immigration & Naturalization Serv.*, 98 F.3d 416, 422 (9th Cir. 1996). There are many examples of transfers by courts of appeals to district courts and vice versa. *See, e.g., Umpaqua Marine*, 925 F.2d at 414; *Southwest Marine*, 896 F.2d at 535; *Martin v. Nickels & Dimes, Inc.*, 804 F. Supp. 83, 85-86 (D. Haw. 1992); *Oil Chem. & Atomic Workers v. Skinner*, 724 F. Supp. 1264, 1268-69 (N.D. Cal. 1989); *Jamison v. Federal Trade Comm'n*, 628 F. Supp. 1548, 1552 (D.D.C. 1986).

II.

Southwest Marine's second argument, that this court should not transfer under section 1631 because this case could not "have been brought" in the district court "at the time it was filed or noticed," is based upon Southwest Marine's belief that the Suits in Admiralty Act's two-year statute of limitations, 46 U.S.C.A. App. § 745 (West Supp. 1997), applies to all

maritime contract cases. Southwest Marine argues that the secretary's action accrued in April 1989, the date of injury, and

> it was not until over five years later, on May 11, 1994 that the Navy issued a contracting officer's decision of the claim. The Government's Notice of Appeal was filed nearly eight years after all of the facts of its claim had occurred (nearly eleven years after the contract was performed). On those circumstances, the only issue is whether the two-year limitations period was somehow tolled until the ASBCA issued its decision.

(Citations omitted.) The secretary argues that the limitations period of the Suits in Admiralty Act is inconsistent with the Contract Disputes Act and thus does not apply to an action concerning review of a board of contract appeals decision in a maritime contract case.

Southwest Marine clearly acknowledges that the Contract Disputes Act applies to this case. Southwest Marine was the party which appealed to the ASBCA. *See* 41 U.S.C. § 602(a) (1994). Generally, under the Contract Disputes Act, an aggrieved party must first present its claim to the contracting officer within six years after the accrual of the claim, *see* 41 U.S.C.A. § 605(a) (West Supp. 1997). If the party receives an adverse decision, the party may seek judicial review, *see* 41 U.S.C.A. § 609(a) (West Supp. 1997), or appeal to the appropriate board of contract appeals. *See* 41 U.S.C.A. §§ 606-07 (West Supp. 1997). Board decisions are also subject to judicial review. *See* 41 U.S.C. § 607(g) (1994).

The procedure is similar for maritime contracts. Thus, before an action involving a maritime contract to which the Government is a party may proceed to district court, the contractor or agency must first present a claim to the contracting officer. *See* 41 U.S.C.A. § 605. The losing party may appeal either to the agency board or seek review in a district court. *See Southwest Marine, Inc. v. United States,* 680 F. Supp. 1400, 1402 n.1 (N.D. Cal. 1988) (district courts and the boards of contract appeals have concurrent jurisdiction to review an adverse decision of a contracting officer). Nothing in section 603 of the Contract Disputes Act excludes maritime contracts from the purview of the Contract Disputes Act. *See Nan Sing Marine Co. v. United States,* 811 F.2d 1495, 1498 n.7 (Fed. Cir. 1987) (the Contract Disputes Act authorizes an administrative determination of a claim involving the breach of a maritime contract); *Southwest Marine,* 680 F. Supp. at 1403 (contractors must comply with procedural requirements of Contract Disputes Act); *River & Offshore Servs. Co. v. United States,* 651 F. Supp. 276, 281 (E.D. La. 1987) (section 603 simply vests an appeal of an administrative determination in a district court rather than in the Court of Claims or the Federal Circuit) (citing *Whitey's Welding & Fabrication, Inc. v. United States,* 5 Cl. Ct. 284 (1984)); *see also* 28 U.S.C. § 1333 (1994) (the district courts have original jurisdiction of, inter alia, "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they otherwise are entitled."). Following a proceeding in a board of contract appeals, a party may seek judicial review.

An appeal of a board of contract appeal's decision concerning a maritime contract is treated separately in the Contract Disputes Act:

> *Appeals* under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 [the Suits in Admiralty Act] or 22 [the Public Vessels Act] of Title 46 as applicable, *to the extent that those chapters are not inconsistent with this chapter.*

41 U.S.C. § 603 (1994) (emphasis added). Under the plain language of section 603, the Suits in Admiralty Act is applicable to appeals otherwise arising under section 607(g) to the extent that the Suits in Admiralty Act is not inconsistent with the Contract Disputes Act. The Suits in Admiralty Act provides that a proceeding in admiralty involving the United States must be brought in a district court, *see* 46 U.S.C.A. app. § § 742, 782 (West Supp. 1997), and that such a suit "may be brought only within two years after the cause of action arises." 46 U.S.C.A. app. § 745.

This court has not previously addressed whether application of the Suits in Admiralty Act's limitations period is inconsistent with the Contract Disputes Act's provisions allowing for and governing appeals of boards of contract appeals' decisions. Southwest Marine relies on *McMahon v. United States,* 342 U.S. 25, 96 L. Ed. 26, 72 S. Ct. 17 (1951), for the proposition that the Suits in Admiralty Act's limitations period is not tolled while a claimant pursues available administrative remedies. The court notes, however, that *McMahon* and all of the other cases that Southwest Marine relies on involved operative facts occurring before the effective date of the Contract Disputes Act. None of the cases involved the issue whether an appeal of an action properly filed under

the Contract Disputes Act is subject to the Suits in Admiralty Act's two-year statute of limitations.

Instructive on the issue of the timeliness of a civil action, when administrative review of a contract dispute is required, is *Crown Coat Front Co. v. United States*, 386 U.S. 503, 18 L. Ed. 2d 256, 87 S. Ct. 1177 (1967). In that case, the Court distinguished *McMahon* from cases that involve the application of a contract disputes clause. Discussing the application of the Tucker Act, the Court stated that "in disputes clause cases, however, final administrative action, which the claimant must await, may occur more than six years after the completion of a contract. When it does, the claimant would be time-barred if the six-year period is measured from the date of final performance." *Id.* at 517-18. The Court held that when a claim arises under a contract and is subject to an administrative determination pursuant to a disputes clause, the right to bring a civil action does not accrue until an administrative determination is rendered.

According to Southwest Marine, the Suits in Admiralty Act's two-year statute of limitations accrued at the time the dispute arose and its purported running bars further action in this case. This contention, however, must be viewed in accordance with the principles of Crown Coat. Here, the parties were in negotiations for several years before a claim was submitted to the contracting officer. The contracting officer took additional time to render a decision. It is worth reiterating that the contracting officer sided with the secretary. Thus, the secretary could not have filed a civil action at that juncture. Thereafter, the case was pending at the ASBCA for over two years. If the court were to hold that the Suits in Admiralty Act's two-year statute of limitations accrues at the time a dispute

arises, a party receiving an adverse decision would almost always lose the opportunity to file a civil action while the case was wending its way through the required administrative process. Application of the limitations period in this manner would clearly be inconsistent with the Contract Disputes Act and its procedures allowing for and governing review of ASBCA decisions. *See id.* at 514.

Further, Southwest Marine's argument turns the plain language of section 603 on its head. *See* 41 U.S.C. § 603 ("Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46 as applicable, *to the extent that those chapters are not inconsistent with this chapter.*") (emphasis added). Nothing in the legislative history of the Contract Disputes Act indicates that Congress intended the Suits in Admiralty Act's limitations period to supersede the Contract Disputes Act. *See In re Alappat,* 33 F.3d 1526, 1531 (Fed. Cir. 1994) (in banc) (absent clearly expressed legislative intent to contrary, plain and unambiguous meaning of a statute prevails). Thus, Southwest Marine's argument would lead to a result not intended by Congress.

CONCLUSION

Because this case could have and should have been brought in the district court, and because this court determines that transfer to that court is in the interest of justice, this court will grant the secretary's motion to transfer the case to the United States District Court for the Southern District of California pursuant to section 1631 and deny Southwest Marine's motion to dismiss.

Accordingly,

IT IS ORDERED THAT:

(1) The secretary's motion to transfer the case to the United States District Court for the Southern District of California is granted.

(2) Southwest Marine's motion to dismiss is denied.

FOR THE COURT

August 8, 1997
Date

/s/_____
Randall R. Rader, District Judge

ISSUED AS A MANDATE: SEPTEMBER 30, 1997

APPENDIX E

ARMED SERVICES BOARD OF CONTRACT APPEALS

[Dated October 16, 1996]

ABSCA No. 47621

Appeal of –)
Southwest Marine, Inc.)
)

Under Contract No. N00024-85-C-8506

APPEARANCES FOR THE APPELLANT: Peter B. Jones, Esq., Jones & Donovan, Irvine, CA.

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq., Navy Chief Trial Attorney, Evadne Sanichas, Esq., Senior Trial Attorney, Navy Litigation Office, San Bruno, CA.

OPINION BY ADMINISTRATIVE JUDGE HARTMAN ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

In this appeal, the Government contends that it is entitled to the return of over $ 2 million it paid a prime contractor because subcontractors, financing institutions, and a state insurance fund ultimately accepted less than the face value of debentures or other financial instruments received

from the prime under a bankruptcy reorganization plan. Appellant, however, contends that debts owed to subcontractors, financing institutions, and the insurance fund were "discharged," and the Government cannot found a claim for the return of contract payments on any action taken regarding financial instruments received under the reorganization plan.

STATEMENT OF FACTS FOR PURPOSES OF MOTIONS

In August 1985, the Department of the Navy, Naval Sea Systems Command awarded a fixed-price, incentive contract for the "regular overhaul, repair and alteration of [the] USS DULUTH" to Northwest Marine Iron Works ("NMIW"), a small business as defined by Federal law. The contract, No. N00024-85-C-8506, contained a target profit of "$ -0-," a Government/contractor share line of "70/30," a target cost of $ 12,282,010, and a ceiling price of $ 15,966,613. It also contained standard clauses, such as Federal Acquisition Regulation ("FAR") 52.232-16 (Alt. I) (Progress Payments (APR 1984)) and FAR 52.216-16 (Incentive Price Revision - Firm Target (APR 1984)) ("IPR clause"). The former provided that each progress payment shall be computed as a specified percentage of the contractor's total costs incurred under the contract "whether or not actually paid." The latter is set forth in part in the appendix to this decision for ease of reference. (R4, tab 1 at 1, 2, 40, 42, 46-48; appellant's first set of requests for admission ("app. RFA") No. 3; compl. ¶¶ 3, 6, 7; ans. ¶¶ 3, 6, 7)

NMIW completed the overhaul work within the period prescribed by the contract and, in June 1986, redelivered the

USS DULUTH to the Navy. The parties, however, continued to perform various contract responsibilities, such as negotiating the cost of change orders and submitting data necessary to establish a final contract price. For example, in July 1986, NMIW submitted to the Navy a report which indicated its estimated performance costs were $ 24,865,000. (R4, tab 1 at 12; compl. ¶ 15; ans. ¶ 15; app. exh. 4 at 4)

During contract performance, the parties agreed to more than 200 contract modifications, many of which altered the target cost and ceiling price under paragraph (k) of the IPR clause. Five of the modifications (Nos. A00088, A00122, A00123, A00144, A00173) increased the contract's billing price pursuant to paragraph (f)(2) of the IPR clause. Modification No. A00188, which was executed on 22 September 1986, established that future billing prices would "be equal to the contract ceiling price" pursuant to paragraph (f)(2) of the IPR clause. (R4, tabs 2, 26; compl. ¶ 15; ans. ¶ 15)

Approximately four months after redelivering the USS DULUTH, on 29 October 1986, NMIW filed a petition in the U.S. Bankruptcy Court for the District of Oregon pursuant to Chapter 11 of the Bankruptcy Code, for protection from its creditors. The Navy's contracting officer ("CO") and Supervisor of Shipbuilding ("SUPSHIP") Seattle were both aware of the petition. The Navy filed claims in NMIW's bankruptcy action, including one for monies allegedly owed on a contract concerning the USS WILSON, but did not assert any claim with respect to amounts paid or to be paid under its contract for overhaul of the USS DULUTH. (App. RFA Nos. 10, 11, 15, 16, 25)

On 20 March 1987, the bankruptcy court confirmed NMIW's "Second Amended Plan of Reorganization." The plan provided that creditors with unsecured claims in excess of $1,000 would receive from the "Reorganized Company" debentures "in a principal amount equal to their Allowed Unsecured Claim," which would bear interest at a rate of 5 percent and provide for a *pro rata* reduction of principal owing by one half of the reorganized company's net income before taxes (excluding gain or loss from sale or disposition of capital assets) in excess of 2.5 percent of gross sales for the preceding fiscal year beginning in September 1987. The plan provided that two financing institutions which possessed secured claims, First Interstate Bank of Oregon and Willamette Savings and Loan, would receive, respectively, (1) net proceeds from sale or disposition of specified property, a reduction of the remaining claim balance by 5 percent of the reorganized company's net income before taxes (excluding gain or loss from sale or disposition of capital assets) in excess of 2.5 percent of gross sales for the preceding fiscal year beginning in September 1987, and interest upon the balance at a rate of 10 percent, and (2) promissory notes in specified sums, which would bear interest at a rate of 10 percent, be secured by the property of the reorganized company, and be payable pursuant to specified terms. Finally, the plan provided that "All Allowed Unsecured Claims of governmental units of a kind specified in and entitled to priority pursuant to Section 507(a)(7)" of title 11, United States Code, would "be paid in five equal, annual, principal installments together with interest at 7.5 percent . . . commencing on February 1, 1988." (App. exh. 8, 10)

During April 1987, NMIW submitted to the Navy a standard form 1411 ("Statement of Allowable Costs Incurred")

identifying final contract costs pursuant to paragraph (c) of the IPR clause. NMIW's form indicated it had incurred costs of $ 25,093,862 under the instant contract. (R4, tab 4)

Approximately 19 months later, on 21 December 1988, SUPSHIP Seattle and NMIW agreed to settle NMIW's request for an equitable adjustment and several open change order issues for nearly $ 2.8 million. By letter dated 4 January 1989, the CO notified NMIW that, "upon receipt of requested funding, a modification will be issued to the contract incorporating the agreement reached on 21 December 1988." (App. RFA Nos. 17, 19; app. exh. 8)

In a "Letter of Agreement" dated 23 February 1989, Southwest Marine, Inc. ("SWM") set forth the "principal terms and conditions of an agreement that had been reached among" it, NMIW, and NMIW's shareholders regarding "acquisition by [SWM] . . . of the issued and outstanding shares of capital stock of [NMIW]." This letter conditioned SWM's "obligations" upon, among other things, NMIW obtaining specified debt concessions from First Interstate Bank, Willamette Savings and Loan, the State Accident Insurance Fund ("SAIF"), the holders of debentures issued under the bankruptcy reorganization plan, and other creditors. (R4, tab 5 at 1-16; compl. ¶ 18; ans. ¶ 18)

During March 1989, NMIW and the Defense Contract Audit Agency ("DCAA") agreed upon indirect "final rates established by audit determination" for NMIW's fiscal years ending 31 May 1986 and 1987. DCAA has asserted that, at the time of this agreement, it was not aware of any agreement between NMIW and SWM concerning purchase of NMIW

stock or debt concessions by NMIW creditors. (R4, tabs 13 at exh. 1, 15 at 1-2, 25 at 2)

By contract modification No. A00202 signed 3 April 1989, the CO implemented the 21 December settlement between the Navy and NMIW. The modification increased the ceiling price to $ 23,295,752. On 5 April 1989, NMIW forwarded to the Navy invoice No. 7500-T claiming entitlement to payment of $ 2,811,077, *i.e.*, the ceiling price, as increased by modification No. A00202, less previous Navy payments ($ 20,474,675) and a sum to be retained for closeout ($ 10,000). The invoice contained the certification set forth in FAR 33.207(c) and made no mention of any agreement between NMIW and SWM regarding the purchase of NMIW stock. The next day, on 6 April, the CO approved payment of NMIW's invoice and, shortly thereafter, NMIW received payment. (R4, tabs 2, 3 at 66-70, 26 at 3; app. RFA Nos. 22, 23, 29; Gov't exh. 1)

On or about 17 April 1989, SWM purchased the NMIW stock and commenced operating the shipyard as a wholly-owned subsidiary (R4, tabs 11, 16, 22, 26 at 3; Cotter decl.). A few days later, on 20 April 1989, the bankruptcy court issued a "Chapter 11 Final Report," memorializing NMIW's success in obtaining creditor concessions. The report stated:

> . . . [T]he Continuing Creditors' Committee . . . has agreed on behalf of all holders of debentures to compromise and settle the balances due on the debentures upon payment of $ 1,000 or 10 percent of the principal amount outstanding on each such debenture, whichever

> is greater. Such amount will be paid by Northwest forthwith but in no event later than May 1, 1989.
>
> * * *
>
> . . . All secured claims provided for in the Plan have been paid or will be satisfied as provided in agreements among the parties or in the Plan.

(Gov't exh. 4)

By letter dated 21 April 1989, the Navy notified NMIW that it had learned at least one of NMIW's creditors had elected to forgive some indebtedness, presumed much of the excused debt concerned fees incident to Navy contracts, was considering recoupment of fees it had paid, and desired information regarding NMIW's debt forgiveness (R4, tab 8). NMIW replied by letter dated 26 April 1989 that the manner of settlement or discharge of its indebtedness to any third parties, including discharge effected pursuant to reorganization, had "no effect on incurred costs properly accrued prior to [its] discharge" and it was not aware of any contract clause that would permit the Navy to recoup fees previously paid (R4, tab 9).

For the next five years, the parties continued to discuss the Navy's belief that it was entitled to recoup monies paid. The Navy argued it could recover the monies under FAR 31.201-5 and had DCAA perform various audits, which concluded that NMIW (1) incurred total costs of $ 24,467,062, (2) obtained debt forgiveness of approximately $ 3 million, (3) incurred "allowable contract costs" therefore only of about $ 21 million

pursuant to "FAR 52.216-7(b)," and (4) owed the Navy more than $ 2 million as a result of having received payments in excess of $ 23 million. NMIW, which legally changed its name to "Northwest Marine, Inc." during 1990, however, maintained the Navy had no right to participate in a compromise of debts "occurring in conjunction with a bankruptcy proceeding." (R4, tabs 10 through 25)

On 11 May 1994, the CO issued a seven-page, final decision finding that the Navy had overpaid $ 2,161,287 and demanding that Northwest Marine, Inc. credit or refund that amount to the Navy. The decision stated:

> Contract Clause I-1-67 (FAR 52-232-16) entitled "Progress Payments" (APR 1984) provides that:
>
> > (a)(2)(i) The costs of supplies and services purchased by the Contractor directly for this contract may be included only after payment by cash, check, or other form of actual payment.
>
> . . . The [CO] finds the forgiveness of debt to disqualify such costs as allowable, reimbursable contract costs.

The decision further stated that "debt concessions are deemed to fall within the meaning of the Credits provision of FAR Subsection 31.201-5," and that a rebate is due since the "IPR clause provides that contract values . . . are subject to downward adjustment" and the "actual costs are now computed

to fall well below the amount reimbursed." The decision "itemized" costs "forgiven" as follows:

Direct Costs:		
	Port of Portland	$ 381,757
	PACCORD	113,679
	Other	59,031
Allocable Costs:		
	First Interstate Bank	917,620
	Willamette Savings & Loan	260,882
	SAIF	319,264
	Other	1,186,015
	(Some May Be Direct)	
Total		$ 3,238,248

(R4, tab 26)

SWM, which had executed a novation agreement with the United States in December of 1990 regarding all "contracts . . . made between the Government and [Northwest Marine] before the effective date of the Agreement" in which there are "any remaining rights, duties or obligations," timely appealed the CO's final decision to this Board (R4, tabs 16, 27). Both parties thereafter engaged in discovery and filed motions for summary judgment.

DECISION

Because the standards of Fed. R. Civ. P. 56 guide this Board in resolving motions for summary judgment, the Board will grant such a motion only when the pleadings, depositions, interrogatory answers and admissions on file, together with affidavits, if any, establish that there is no genuine issue as to

a material fact and the moving party is entitled to judgment as a matter of law. *E.g., Information Sys. and Networks Corp.*, ASBCA No. 46119, 96-1 BCA ¶ 28,059. A fact is material if it is necessary and relevant to the proceeding, *i.e.*, may affect the outcome. A genuine issue exists concerning a fact if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 849-50 (Fed. Cir. 1992).

I. Government's Motion

In its motion, the Navy contends that it is entitled to summary judgment because FAR 31.201-5, IPR clause paragraph (g)(2), and the common law all authorize "recovery of overpayments after they have been made." The Navy also contends SWM is estopped from contesting recovery of the overpayment because had the Navy known at the time of making payment to NMIW in spring 1989 that NMIW had "already or shortly would . . . receive the debt concessions from its creditors that it did, [the Navy] would have calculated the net amount it owed to NMIW differently and not have overpaid." (Gov't SJM at 13-15, 18-21)

The premise underlying all of the Navy's contentions clearly is that the Navy "overpaid" NMIW. The Navy, however, cites no support for that premise, other than the "debt forgiveness" NMIW received with respect to debentures and other financial instruments obtained by creditors under NMIW's bankruptcy reorganization plan (Gov't SJM at 1, 4-8, 13, 18-21). Thus, in order to resolve the Navy's motion, we must initially determine whether the Navy may equate

forgiveness of debt regarding instruments received under NMIW's reorganization plan with "Navy overpayment."

A "fixed-price incentive contract," such as the parties', does not contain one firm price at time of award, but a price that is subject to redetermination after performance. It provides for an adjustment of "profit," and establishment of a final overall price, through use of a formula based on the relationship of total target cost to negotiated total final cost. When a contractor completes performance, the parties negotiate a total final cost and a final price is determined by application of a formula specified in the contract. FAR 16.403(a); 16.403-1(a); 52.216-16.

Until a final price is determined, target prices are used as billing prices. Billing prices may be increased within ceiling limits if it becomes apparent that negotiated total final cost will differ substantially from total target cost. FAR 16.403(d); 52.216-16(f).

Contractor "costs" are used to compute the post-performance profit adjustment. FAR 52.216-16(c), (d), (f), and (g). "Costs" means "allowable costs in accordance with Part 31 of the [FAR]." FAR 52.216-16(b). Accordingly, even though the parties' contract is not of the "cost reimbursement" variety, the FAR cost principles govern whether costs will be recognized when computing the final price. *Compare* FAR 16.403 and 52.216-16 *with* FAR 16.301, 16.307, 16.404-1, and 52.216-7; *AT&T Technologies, Inc.*, DOT BCA No. 2007, 89-3 BCA ¶ 22,104 at 111,149.

Here, the parties increased the ceiling price to $ 23,295,752 under FAR 52.216-16(k). They also increased billing prices to the ceiling price under FAR 52.216-16(f). NMIW thereafter requested and received payment from the Navy of the contract ceiling price, less $ 10,000 retained for "closeout." While NMIW redelivered the USS DULUTH and submitted a standard form 1411 identifying final contract costs nearly a decade ago, to date, the parties have not negotiated a total final cost and determined a final price for their contract. Thus, strictly speaking, the issue before this Board is whether the Navy is entitled to the return of progress payments. In actuality, however, our determination of the issue will be *res judicata* regarding the treatment of those costs and control computation of a final contract price. *See* FAR 52.216-16; *AT&T*, *supra*, at 111,149.

As found above, during contract performance, NMIW recorded on its books various costs. Four months after redelivering the USS DULUTH, in Fall 1986, NMIW filed a petition seeking relief under Chapter 11 of the U.S. Bankruptcy Code. Thereafter, on 20 March 1987, the bankruptcy court confirmed NMIW's reorganization plan granting creditors debentures and other financial instruments.

Confirmation of a reorganization plan "discharges" a debtor from debts arising prior to confirmation. 11 U.S.C. § 1141(d)(1)(A); 8A C.J.S. *Bankruptcy* § 408 (1988). Under bankruptcy law, a debtor's "discharge" does not extinguish or cancel pre-confirmation debts. Instead, it simply releases a debtor from "personal liability" for such debts. 11 U.S.C. § 524(a) and (e); *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53-54 (5th Cir. 1993); *Landsing Diversified Properties-II v. First Nat. Bank & Trust Co. of Tulsa (In re*

Western Real Estate Fund, Inc.), 922 F.2d 592, 600-01 (10th Cir. 1990); *In re Conston, Inc.,* 181 B.R. 769, 772-73 (D. Del. 1995) (statement that debt is "extinguished" is simply "judicial gloss"; statutory "discharge" definition does not cause underlying debt to vanish); *cf. Wagner v. United States,* 573 F.2d 447, 453 (7th Cir. 1978); *accord Johnson v. Home State Bank,* 501 U.S. 78, 83-84 (1991). In short, a debtor's "discharge" operates principally as an injunction against post-confirmation action to collect pre-confirmation debts. 11 U.S.C. § 524(a)(2); 8A C.J.S. *Bankruptcy* §§ 98, 349 (1988).

A creditor whose claim is discharged with respect to a debtor is disabled from recovering on the claim from that debtor, but may recover on the claim from third parties possessing liability, such as guarantors, sureties, and insurers. 11 U.S.C. § 524(e); *First Fidelity Bank v. McAteer,* 985 F.2d 114, 118 (3d Cir. 1993); *Green v. Welsh,* 956 F.2d 30, 33-35 (2d Cir. 1992); *Owaski v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.),* 883 F.2d 970, 973 (11th Cir. 1989); *Sandy Ridge Dev. Corp. v. La. Nat. Bank (In re Sandy Ridge Dev. Corp.),* 881 F.2d 1346, 1351 (5th Cir. 1989); *Underhill v. Royal,* 769 F.2d 1426, 1432 (9th Cir. 1985); *Union Carbide Corp. v. Newboles,* 686 F.2d 593, 595 (7th Cir. 1982); *cf. United States v. Anderson,* 366 F.2d 569, 571 (10th Cir. 1966). Thus, after a "discharge," pre-confirmation claims or debts continue to exist as a matter of law.

The bankruptcy court's confirmation of a reorganization plan in March of 1987, therefore, disabled NMIW's creditors from collecting pre-confirmation debts relating to the USS DULUTH. However, it did not extinguish or cancel those debts. The debts continued to exist as a matter of law. *See, e.g.,* 11 U.S.C. § § 524, 1141; *Edgeworth,* 993 F.2d at 53-54.

The Navy's assertion here that creditors forgave, rebated, or otherwise credited to NMIW unpaid USS DULUTH contract costs is not accurate as a matter of law. The inability of creditors to collect pre-confirmation USS DULUTH debts is due to NMIW's receipt of a "discharge," not to any action on their part. A "discharge" arises from operation of Federal law, not the consent of creditors. *See First Fidelity Bank,* 985 F.2d at 118; *Sandy Ridge Dev.,* 881 F.2d at 1351; *Underhill,* 769 F.2d at 1432; *Union Carbide Corp.,* 686 F.2d at 595.

If this Board were to agree with the Navy's assertion that it may recoup as an "overpayment" monies paid NMIW for subcontractor costs because the subcontractors cannot now collect those costs from NMIW, the Navy would obtain a significant benefit from NMIW's bankruptcy "discharge," *i.e.*, the receipt of subcontractor supplies and services at "no cost or charge." Congress, however, did not intend that a "discharge" benefit third parties, such as the Navy. *Green,* 956 F.2d at 33-34, *citing* 3 R. Babitt *et al., Collier on Bankruptcy* ¶ 524.01 at 524-16 (15th ed. 1991). As noted above, the release of liability a debtor receives on "discharge" does not obviate liability of others with respect to pre-confirmation debts and cannot be relied on by others to escape payment liability they possess. *E.g., Underhill,* 769 F.2d at 1432.

A confirmed reorganization plan provides debtors with a "fresh start" and gives creditors a "new claim" under terms specified in the plan. The plan essentially comprises an agreement binding on the debtor and its creditors, and if the debtor fails to adhere to that plan a creditor is free to initiate action against the debtor in an appropriate forum. 11 U.S.C. § 1141(a); *Holstein v. Brill,* 987 F.2d 1268, 1270 (7th Cir. 1993); *In re Benjamin Coal Co.,* 978 F.2d 823, 827 (3d Cir. 1992); *In*

re Shondel, 950 F.2d 1301, 1308 (7th Cir. 1991); *Paul v. Monts*, 906 F.2d 1468, 1474-76 (10th Cir. 1990); W. Norton, *Norton Bankruptcy Law and Practice 2d* § 10-29; 8A C.J.S. *Bankruptcy* § 407 (1988). Accordingly, as a matter of law, the Navy cannot equate the post-confirmation activities of NMIW's subcontractors regarding financial instruments obtained under the reorganization plan with Navy "overpayment" on the USS DULUTH contract.

Because the Navy has not shown NMIW received any "overpayment" under the USS DULUTH contract, an element essential to its theory of recovery, *see NI Indus.*, ASBCA No. 34943, 92-1 BCA ¶ 24, 631 at 122, 912-14, *Celesco Indus., Inc.*, ASBCA No. 20569, 77-1 BCA ¶ 12,445 at 60,284, we cannot grant its summary judgment motion. Based upon our resolution of the "overpayment" issue, we need not, and do not, address the rationale advanced by SWM for denying the Navy's summary judgment motion, *i.e.*, that the furnishing of debentures and other financial instruments under the reorganization plan constituted "payment" of debts owed subcontractors and others relating to the USS DULUTH (app. reply at 12-14).

II. Appellant's Motion

In its motion, SWM contends it is entitled to summary judgment because the Navy has not, and cannot, cite any contract provision authorizing recoupment of progress payments made when debts owed subcontractors or others relating to performance of contract work are not paid. According to SWM, "[w]here a contract provides for payment by the Government based on the contractor's incurred costs, and the contractor has complied with the contract by

performing and by establishing his costs, this Board has squarely held that payment is due without regard to whether the prime contractor has paid his suppliers or may have payment disputes with them." (App. SJM at 11- 14 and app. reply at 5-7, *citing Patel Enterprises,* ASBCA No. 41529, 93-2 BCA ¶ 25,863)

SWM is correct that we previously held a small business is to be paid its incurred subcontractor costs even if it is delinquent in paying those costs. *Patel Enterprises*, *supra*, at 128, 680-81. Our holding, however, was based upon the express language of FAR 52.216-7, which concerns allowable costs under cost reimbursement contracts and is not among the clauses set forth in the parties' contract. Accordingly, our prior holding does not control this appeal, and we must examine the parties' contract to ascertain if it includes any provision authorizing recoupment of the disputed payments.

While the CO's final decision cites FAR 52.232-16 as a basis for recoupment, that clause does not govern the making of progress payments here. Because NMIW is considered a "small business," the contract contains FAR 52.232-16 (Alt. I), which expressly provides that progress payments shall be computed as a percentage of total costs incurred "whether or not actually paid." Thus, the standard progress payment clause set forth does not authorize the Navy to recoup progress payments based upon a failure to pay debts owed to subcontractors or others.

The CO's final decision also cites FAR 31.201-5 as a basis for recoupment. That regulation requires a contractor receiving reimbursement of incurred costs from the Government to credit the Government if it simultaneously or

subsequently recovers a portion of the same costs from another source. *See NI Indus., supra*, at 122, 912-14; *Celesco Indus., supra*, at 60,284. However, as noted above, the "discharge" of subcontractor or other debts under a bankruptcy reorganization plan cannot be deemed, as a matter of law, to constitute recovery of the same costs from another source because pre-confirmation costs/debts continue to exist legally after "discharge" and simply are enjoined from collection as a personal liability of the contractor. *See* 11 U.S.C. § § 524, 1141; *Edgeworth*, 993 F.2d at 53-54; *Underhill*, 769 F.2d at 1432. FAR 31.201-5, therefore, also does not authorize recoupment of the disputed progress payments.

The only other basis cited in the final decision for recoupment is FAR 52.216-16, which states that, if the contractor has received payments exceeding the sum due, it "shall immediately refund or credit to the Government the amount of this excess." While the CO states in the decision that NMIW received payments exceeding the sum due because "[t]he costs of supplies and services purchased by the Contractor. . . may be included only after payment by cash, check, or other form of actual payment,'" the CO quotes and relies upon a progress payment clause which is not applicable. As noted above, the applicable clause provides progress payments shall be computed as a percentage of total costs incurred "whether or not actually paid." FAR 52.232-16 (Alt. I). Moreover, while the CO also states in the decision that NMIW received payments exceeding the sum due because the "forgiveness" of debt disqualifies costs as "allowable" costs, as noted above, the "discharge" of subcontractor or other debts under a bankruptcy reorganization plan cannot be considered debt "forgiveness" because pre-confirmation debts continue to exist legally after "discharge" and simply are enjoined from

collection as a personal liability of the contractor. *See* 11 U.S.C. §§ 524, 1141; *Edgeworth,* 993 F.2d at 53-54; *Underhill,* 769 F.2d at 1432.

In its opposition to SWM's motion, the Navy does not cite any additional contractual or regulatory basis for recoupment of the disputed progress payments. Rather, it simply asserts the Board is precluded from granting summary judgment to SWM because the issue of whether the disputed costs were incurred and allowable requires a factual inquiry. According to the Navy, resolution of the issue requires "detailed information concerning what the costs were for and what their accounting treatment at different points in time was." (Gov't SJM at 13-14)

No such information, however, is necessary. It is undisputed that DCAA performed various audits relating to this contract and found NMIW had incurred costs of $ 24,467,062 prior to the actions which DCAA and the CO characterize incorrectly as USS DULUTH debt "forgiveness." Thus, there is no genuine issue of material fact regarding whether NMIW "incurred" the costs. Moreover, it is undisputed that both DCAA and the CO deemed the costs "allowable" prior to the actions they characterize incorrectly as USS DULUTH debt "forgiveness," and that the actions they now deem make the costs "unallowable" are creditors' acceptance during 1989 of less than the face value of debentures and other instruments received under NMIW's bankruptcy reorganization plan. Because we reject, as a matter of law, the Navy's characterization of the creditors' 1989 actions as USS DULUTH debt "forgiveness," there also is no genuine issue of material fact regarding the accounting treatment of the costs at different points in time.

Where there is no dispute over the reasonableness or amount of costs incurred, nor over the allocability of amounts charged to a contract, and the Government seeks to disallow costs solely upon the basis they are "unallowable," as here, the Government bears the burden of proving that the costs are of the type made specifically unallowable by regulation or contract provision. *Lockheed-Georgia Co.*, ASBCA No. 27660, 90-3 BCA ¶ 22,957 at 115,276; *Rockwell Int'l Corp.*, ASBCA No. 20304, 76-2 BCA ¶ 12,131 at 58,302. The Navy has not attempted to satisfy that burden here, even though SWM seeks entry of summary judgment on the ground the Navy cannot satisfy that burden.

If a party seeks summary judgment on the ground the nonmoving party cannot make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will bear the burden of proof at trial, the nonmoving party cannot assert simply that a trial is necessary, but must go beyond the pleadings and, by affidavit, deposition, interrogatory answer, or admission on file "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986). In response to SWM's motion, the Navy has not designated any specific fact showing there is a genuine issue for trial or pointed to any contract provision which would allow it to recoup the disputed progress payments. SWM, therefore, is entitled to entry of summary judgment.

CONCLUSION

The Navy's motion for summary judgment is denied and appellant's motion for summary judgment is granted. The appeal is sustained.

Dated: 11 October 1996

/s/_____
TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

/s/_____
ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

/s/_____
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

APPENDIX

. . . INCENTIVE PRICE REVISION -- FIRM TARGET . . .
(FAR 52.216-16)

(a) General. The supplies or services identified in the Schedule . . . are subject to price revision in accordance with this clause; provided that in no event shall the total final price of these Items exceed the ceiling price . . . .

(b) Definition. "Costs," as used in this clause, means allowable costs in accordance with Part 31 of the [FAR] in effect on the date of this contract.

(c) Data submission. (1) Within ninety (90) days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified . . . , the Contractor shall submit on Standard Form 1411 . . . –

(i) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

(ii) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work . . . ;

(iii) A list of all residual inventory . . . ; and

(iv) Any other relevant data that the Contracting Officer may reasonably require.

* * *

(d) Price revision. Upon the Contracting Officer's receipt of the data required by paragraph (c) above, the Contracting Officer and the Contractor shall promptly establish the total final price of the items specified . . . by applying to final negotiated cost an adjustment for profit or loss, as follows:

(1) On the basis of the information required by paragraph (c) above, together with any other pertinent information, the parties shall negotiate the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss, as follows:

(i) If the total final negotiated cost is equal to the total target cost, the adjustment is the total target profit.

(ii) If the total final negotiated cost is greater than the total target cost the adjustment is the total target profit, less thirty (30) percent of the amount by which the total final negotiated cost exceeds the total target cost.

(iii) If the final negotiated cost is less than the total target cost, the adjustment is the total target profit plus thirty (30) percent of the amount by which the total final negotiated cost is less than the total target cost.

(e) Contract modification. The total final price of the items specified . . . shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer. This price shall not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that --

(1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of those elements; and

(2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.

(f) Adjusting billing prices. (1) Pending execution of the contract modification (see paragraph (e) above), the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be based on the target prices shown in this contract.

(2) If at any time it appears from information provided by the Contractor under subparagraph (g)(2) below that the then-current billing prices will be substantially greater than estimated final prices, the parties shall negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing final cost under this contract will be substantially greater than target cost.

(3) Any billing price adjustment shall be reflected in a contract modification and shall not affect the determination of the total final price under paragraph (d) above. After the contract modification establishing the total final price is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits shall be made promptly.

(g) Quarterly limitation on payments statement. This paragraph (g) shall apply until final price revision under this contract has been completed.

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year . . . the Contractor shall submit to the contract administration office (with a copy to the . . .

cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing --

(i) The total contract price of all supplies delivered or services performed) and accepted by the Government and for which final rates have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

* * *

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (1)(iv) above exceeds the sum due the Contractor, . . . the Contractor shall immediately refund or credit to the Government the amount of this excess.

* * *

(k) Equitable adjustment under other clauses. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost

and may be made in the maximum dollar limit on the total fnal price, the total target profit, or both.

I certify that the forgoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 47621, Appeal of Southwest Marine, nc. rendered in conformance with the Board's Charter.

Dated: 16 Oct. 1996

/s/_____
EDWARD S. ADAMKEWCZ
Recorder, Armed Services
Board of Contract Appeals